DOCKET

No. 87-1868-CFX Title: Mead Corporation, Petitioner
Status: GRANTED v.
B. E. Tilley, et al.

Docketed: Court: United States Court of Appeals
May 16, 1988 for the Fourth Circuit

Counsel for petitioner: Faruki,Charles J.

Counsel for respondent: Stone,Edwin C.

Entry	Date	Note	Proceedings and Orders
1	May 16 1988	G	Petition for writ of certiorari filed.
2	May 16 1988		Appendix of petitioner Mead Corp. filed.
3	Jun 9 1988		Brief amicus curiae of American Paper Institute, Inc. filed.
4	Jun 10 1988		Brief amicus curiae of American Academy of Actuaries filed.
8	Jun 15 1988		Brief of respondents B.E. Tilley, et al. in opposition filed.
5	Jun 16 1988		Brief amicus curiae of Society of Pension Actuaries filed.
6	Jun 16 1988		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
7	Jun 16 1988		Brief amicus curiae of Pension Benefit Guaranty Corp. filed.
9	Jun 21 1988		DISTRIBUTED. September 26, 1988
10	Jul 1 1988	X	Reply brief of petitioner Mead Corp. filed.
11	Aug 6 1988	X	Supplemental brief of petitioner filed.
14	Sep 6 1988	D	Motion of respondents to substitute Richard H. Wall, Executor of the Estate of David H. Wall, in place of David H. Wall, deceased, filed.
13	Sep 10 1988	X	Supplemental brief of petitioner Mead Corp. filed.
15	Sep 14 1988		Petitioner's response to motion of respondents to substitute Richard H. Wall, Executor of the Estate of David H. Wall, in place of David H. Wall, deceased, as party re spondent filed.
16	Oct 3 1988		Petition GRANTED. **
17	Oct 3 1988		DISTRIBUTED. October 7, 1988. (Motion of respondents to substitute Richard H. Wall).
18	Oct 5 1988		Respondents' response to petitioner's objection to substitute parties.
19	Oct 11 1988		DISTRIBUTED. October 14, 1988. (Motion to substitute Richard H. Wall).
20	Oct 17 1988		Motion of respondents to substitute Richard H. Wall, Executor of the Estate of David H. Wall, in place of David H. Wall, deceased, DENIED.
21	Nov 16 1988		Brief amicus curiae of Society of Pension Actuaries filed.
22	Nov 16 1988		Brief amicus curiae of American Academy of Actuaries filed.
23	Nov 16 1988		Record filed.
		*	Certified copy of original record and proceedings, 4 volumes, received.
24	Nov 17 1988		Joint appendix filed.
25	Nov 17 1988		Brief of petitioner Mead Corp. filed.
26	Nov 17 1988		Brief amicus curiae of Natl. Employee Benefits Institute filed.
27	Nov 17 1988		Brief amicus curiae of Chamber of Commerce of the U.S.

No. 87-1868-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
28	Nov 17 1988		Brief amicus curiae of American Paper Institute, Inc. filed.
29	Nov 17 1988		Brief amicus curiae of Pension Benefit Guaranty Corp. filed.
31	Dec 9 1988		Order extending time to file brief of respondent on the merits until December 24, 1988.
34	Dec 22 1988		Brief of respondent B.E. Tilley, et al. filed.
32	Dec 23 1988		Brief amicus curiae of American Association of Retired Persons filed.
33	Dec 23 1988		Brief amicus curiae of AFL-CIO filed.
36	Jan 6 1989		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 22, 1989. (2ND CASE.)
35	Jan 10 1989		CIRCULATED.
37	Jan 23 1989	X	Reply brief of petitioner Mead Corp. filed.
38	Feb 22 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 1868 (1)

NO. ________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE MEAD CORPORATION,

Petitioner

v.

B.E. TILLEY, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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36pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, upon termination of a pension plan, Section 4044(a)(6) of the Employee Retirement Income Security Act of 1974 ("ERISA") requires benefits not earned under the terms of the plan to be paid to plan participants before surplus plan assets may revert to the employer.

2. Whether the Fourth Circuit erred in using a method not authorized by the pension plan for computation of respondents' benefits when the issue of damages was not addressed by the district court; was not briefed by the parties on appeal; and when both parties agreed that damages were not an issue on appeal.*

* This question is not argued in this petition. It is raised in order to preserve it; it will be fully briefed if certiorari is granted.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, The Mead Corporation, and the respondents, B.E. Tilley, David H. Wall, William L. Crotts, Chrisley H. Reed, J.C. Weddle, and William D. Goode. The parties before this Court are identical, except for Respondent David H. Wall who died after the initiation of the action in the district court.*

SUBSIDIARIES AND AFFILIATES OF PETITIONER, THE MEAD CORPORATION

B.C. Chemicals, Ltd.
Brunswick Chemical Company, Inc.
Brunswick Export Sales, Inc.
Brunswick Pulp Land Company, Inc.
Brunswick Pulp & Paper Company
Northwood Forest Industries, Ltd.
Northwood Pulp and Timber, Ltd.
Northwood Waferboard, Ltd.
Harima M.I.D., Inc.
International Fibre Sales, S.A.
Mead-Emballage (S.A.)
Mead Europe Engineering S.A.R.L.
Mead Pac AB
Mead-Toppan Company, Ltd.
Sistemas de Envase Y Embalaje, S.A.

* Respondents' initial brief in the Fourth Circuit, at 9, n.1. No substitution of an administrator or executor of Mr. Wall's estate was made in either the district court or the court of appeals.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE MEAD CORPORATION,
Petitioner

v.

B.E. TILLEY, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner The Mead Corporation ("Mead") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this case on April 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 815 F.2d 989, and is reprinted in Appendix A, at 1a. The memorandum opinion of the United States District Court for the Western District of Virginia (Turk, Chief Judge), is not reported. It is reprinted in Appendix B, at 10a.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1987. App. C at 16a. A timely petition for rehearing with suggestion for rehearing en banc was denied by the Fourth Circuit on February 17, 1988. App. C. at 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent portions of ERISA Section 4044, 29 U.S.C. § 1344 (1974) are set forth in Appendix D, at 18a-19a.

STATEMENT OF THE CASE

I. BACKGROUND

This case involves an interpretation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. ERISA is the landmark legislation establishing a comprehensive federal legislative and regulatory program in the pension field. Nationwide, over 49 million employees are covered by 849,000 retirement plans that control almost $2 trillion of plan assets.[1] The issues in this case are vitally important to the sound funding and proper administration of more than a quarter of those plans and to the employees for whom those plans provide benefits.

[1] 7 Employee Benefit Notes 1 (EBRI) (Nov. 1986); 8 Employee Benefit Notes 5 (EBRI) (Nov. 1987); 8 Employee Benefit Notes 5 (EBRI) (Dec. 1987).

II. FACTS

The facts of this case are undisputed.[2] Respondents are six former employees of the Lynchburg Foundry Company (the "Foundry"), previously a wholly-owned subsidiary of Mead. They were participants in Mead's Industrial Products Salaried Retirement Plan (the "Plan"), a tax-qualified, single-employer pension plan funded entirely by employer contributions. The Plan contained a "unit benefit" formula setting forth the specific benefits to be received by each participant upon retirement.[3]

The Mead Plan's normal retirement age was sixty-five. Under Article V Section 2(b) of the Plan, however, a participant with thirty years of service who had attained age sixty-two could retire with an early retirement benefit consisting of the retiree's full benefit under the Plan's unit benefit formula without any actuarial reduction because benefits would begin before age sixty-five. App. E at 21a. Benefits such as these are generally referred to as "unreduced" or "subsidized" early retirement benefits.

In 1983 Mead sold the Foundry to a new owner, terminated the Plan, and severed respondents' employment with Mead.[4] At the time of Plan termination, none of the respondents had satisfied the Plan's criteria for unreduced early

[2] App. A at 4a; App. B at 10a.

[3] App. E at 20a, 21a. Under a unit benefit plan a participant's benefit upon termination of employment is calculated by reference to the participant's years of credited service. For example if a plan provides an annual benefit of $500 for each year of credited service, and at age 65 a participant has 20 years of credited service, the participant's annual retirement benefit will be $10,000 per year.

[4] Joint Appendix in the court of appeals ("C.A. App.") at 130, 253-54; Record on Appeal ("R") 15, ¶ 2, R. 16, ¶ 2.

retirement benefits.[5] All participants who had satisfied the Plan's age and service requirements for early retirement received their unreduced early retirement benefits under Article V Section 2(b). C.A. App. at 253. Respondents and all other participants who had not satisfied the Plan's age and service requirements for early retirement were paid the value of their earned (accrued) benefits;[6] these sums were sizeable, but they did not include an amount representing the subsidized early retirement feature of the Plan.[7] In other words, each payment made to a respondent represented the value of that particular respondent's age sixty-five normal retirement benefit accrued through the date of Plan termination.

There was in excess of $10 million left in the fund after the payment of all of these benefits. This amount was recouped by Mead (C.A. App. at 49-50), as specifically authorized by the Plan and permitted by ERISA.[8]

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[5] Five of the respondents had each worked more than 30 years at the time the Plan was terminated, but none had reached the age of 62. The sixth, W.L. Crotts, had 28 years of service and was 61 years of age when the Plan terminated. Exh. 1 to Respondents' initial brief in the Fourth Circuit, at 39.

[6] For purposes of this petition, the terms "earned" and "accrued" are treated as synonymous. In a unit benefit plan the accrued benefit is calculated by taking into account only the participant's years of credited service to date and expressing the resulting benefit as an annual payment *beginning at age 65*. For example if the plan benefit formula is $500 multiplied by years of credited service, and a participant has accumulated 10 years of credited service, the participant's accrued annual benefit, payable beginning at age 65, would be $5,000 per year.

[7] *Tilley* v. *Mead Corp.*, 815 F.2d 989, 990-91 (4th Cir. 1987). App. A at 2a-4a. The respondents elected to receive their benefits in actuarially equivalent lump-sums: Mr. Tilley received $87,108.74; Mr. Wall $65,360.80; Mr. Crotts $87,552.03; Mr. Reed $69,882.45; Mr. Weddle $50,800.35; and Mr. Goode $83,923.93. C.A. App. at 28, 130-31, 253-54.

[8] Art. VIII § 4(f), App. E at 23a; ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1) (as in effect in 1984). App. D at 19a. The surplus resulted from the advance funding of liabilities that never accrued due to the Plan termination and from favorable investment and other actuarial gains.

On June 15, 1984, respondents filed suit against Mead in state court in Radford, Virginia. Mead removed the case to the United States District Court for the Western District of Virginia, invoking federal jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) and § 1331 (federal question) because the suit involved claims under ERISA. R. 1.

Respondents then filed an amended complaint in seven counts. R. 15. In Counts III through VII, respondents alleged violations of ERISA by Mead and sought damages in the form of subsidized early retirement benefits.[9] Respondents' ERISA claims were submitted to the district court on cross-motions for summary judgment. R. 24, 31.

III. DECISIONS BELOW

A. The District Court's Decision for Mead

On April 18, 1986, the district court entered final judgment denying respondents' motion and granting Mead's motion. App. B at 9a. The district court's memorandum opinion held that the additional benefits sought by respondents were not benefits that had accrued and therefore were not payable to respondents upon plan termination. App. B at 12a, 14a. The district court ruled that Mead was not liable to respondents under ERISA; thus it did not address the issue of damages or the method by which such damages should be computed.

B. The Fourth Circuit's Decision for Respondents

Respondents appealed. On April 9, 1987, the court of appeals reversed the district court's decision and held that upon

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[9] By an agreed order on February 24, 1986, Counts I and II (asserting breach of contract and promissory estoppel claims) were dismissed with prejudice. R. 29.

plan termination Title IV of ERISA prohibited reversion of any plan assets to Mead until it paid early retirement benefits to respondents, "*even if those benefits were not accrued at the time of termination.*"[10]

Titles I and II of ERISA state the rules for participation, accrual, and vesting of benefits. Title IV contains provisions dealing with federal insurance of terminating pension plans.[11] As sole statutory authority for its holding, the court below relied upon Section 4044(a) of Title IV, which ranks the order in which six categories of benefits under a plan must be paid from the assets of a terminating plan, specifically describing the last of these six categories as "all other benefits under the plan." ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1974). App. D. at 19a.

In construing Section 4044(a)(6) as creating a substantive right to recover the unearned early retirement benefits at issue here, the court below adopted a dictum in *Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986).[12] That dictum treats the legislative history of ERISA

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[10] *Tilley*, 815 F.2d at 991. (Emphasis added). App. A at 5a. The court required each respondent's accrued benefit to be calculated as though it was payable at the earliest date the respondent would have been eligible for early retirement benefits, rather than at age 65. *Id.*

[11] Title IV of ERISA is administered by the Pension Benefit Guaranty Corporation ("PBGC"). The PBGC is a quasi-governmental corporation within the Department of Labor, established under ERISA to provide insurance for the payment of certain benefits accrued and vested immediately before plan termination if the terminating plan's assets are not sufficient. ERISA § 4002, 29 U.S.C. § 1302.

[12] In *Amato* plan participants challenged an employer amendment that reduced early retirement benefits. The Second Circuit, reviewing dismissal of certain counts of the complaint, held that the amendment appeared to violate ERISA. The court considered in passing the plan participants' alternative argument that the amendment, even if permissible, amounted to a partial termination of the plan. The court remanded that question to the district court to determine whether or not a partial termination had in fact occurred, stating in dictum that ERISA Section 4044(a)(6) included unaccrued benefits. 773 F.2d at 1415-16. In *Amato*, however, the Second Circuit narrowly defined the issue before it to exclude situations such as that present here. The court stated that the issue was "whether an employer may terminate a plan's unreduced, funded early retirement benefits that are not contingent on an external event." 773 F.2d at 1413. In fact the *Amato* opinion specifically distinguished a case [*Petrella* v. *NL Indus., Inc.*, 529 F. Supp. 1357 (D.N.J. 1982)] which, like the present case, "did not involve a plan amendment but rather the termination of employees prior to their satisfying an age-condition precedent to qualification for pensions." 773 F.2d at 1413. For these reasons petitioner Mead distinguished *Amato* in both courts below. C.A. App. 259-62.

Section 4044(a)(6) as compelling the conclusion that " 'Congress . . . decided not to limit the allocation requirement to accrued benefits but to require that, *as long as assets were available, they should be used to meet participants' benefit expectations based upon the [p]lan's full benefit structure.*' "[13]

The court below next held that the respondents' early retirement benefits must be paid in a lump sum, and specified the method for calculating that lump sum by adopting actuarial equivalences not provided for in the Plan.[14] Both of these holdings were made despite the fact that the issue of damages had neither been briefed by the parties nor addressed by the district court.[15]

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[13] *Tilley*, 815 F.2d at 992, *quoting Amato*, 773 F.2d at 1416 (emphasis added). App. A at 6a. Neither the court below nor the Second Circuit in *Amato* expressly defined or elaborated upon the term "benefit expectations."

[14] *Tilley*, 815 F.2d at 992. App. A at 7a.

[15] In fact on appeal the parties agreed that damages were not in issue. Reply Memorandum of [Respondents] in Support of [Respondents'] Motion to Include Exhibit as part of Opening Brief, at 1; [Mead's] Petition . . . For Rehearing and Suggestion For Rehearing In Banc, at 14. *See also* C.A. App. at 236.

C. Subsequent Proceedings Below

Within three weeks of the Fourth Circuit's decision, on April 24, 1987, counsel for respondents filed a follow-on class action against Mead in the United States District Court for the Western District of Virginia. The complaint seeks additional unaccrued benefits on behalf of a class consisting of other participants in the Mead Plan.[16]

On April 21, 1987, Mead filed a timely petition for rehearing and suggestion for rehearing en banc.[17] The PBGC, the American Society of Pension Actuaries, and the National Institute of Plan Administrators filed amicus briefs in support of Mead's petition for rehearing. In its amicus brief the PBGC advised the Fourth Circuit that "the portion of the *Amato* opinion relied on by the panel misconstrues Section 4044, and the [PBGC] regulations cited by the panel mean the precise opposite of what the panel evidently thought they meant."[18] On February 17, 1988, the Fourth Circuit denied Mead's petition for rehearing. App. C. at 17a.

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[16] *Linkous* v. *The Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987).

[17] In a supplemental rehearing brief, Mead advised the court below of a recent inconsistent decision of another panel of the Fourth Circuit, *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). In describing the surplus or residual assets that may revert to an employer, the court in *Wilson* said that " 'residual assets' are those assets remaining in a pension plan at the time of termination after payment to the employees of all *accrued benefits* under the plan." *Id.* at 458 (emphasis added).

[18] PBGC's Amicus Curiae Brief in Support of [Mead's] Petition for Rehearing and Suggestion of Rehearing En Banc ("PBGC's Brief Below") at 4.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION IS INCORRECT AND WILL SERIOUSLY IMPAIR THE ADMINISTRATION OF ERISA BY THE IRS, THE PBGC, EMPLOYERS, AND PLAN FIDUCIARIES

For thirteen years ERISA has governed employee benefit plans established by private employers.[19] Among ERISA's many provisions are uniform standards which supercede the laws of every state.[20] Title I of ERISA sets out substantive rules governing participation, vesting, funding, and accrual of benefits under all pension plans, and Title II amends the provisions of the Internal Revenue Code which grant tax-favored or "qualified" status to pension plans. Title IV of ERISA establishes the pension termination insurance program administered by the PBGC.[21]

The decision to establish, maintain, or terminate a pension plan is left to the voluntary action of each employer, but ERISA sets forth funding rules that must be followed when a plan is in existence, and other rules governing plan termination. Additionally, while Congress has consistently recognized that employers must be free to buy and sell business assets, and thus to merge, split up, or terminate pension plans, it has also made provision in ERISA to protect pension benefits that have been earned. In such situations ERISA strikes a careful balance between the rights and obligations of both employers

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[19] ERISA § 4, 29 U.S.C. § 1003. For an overview of federal pension law, see J. Gee, *Pensions in Perspective* (2d ed. 1987).

[20] ERISA § 514, 29 U.S.C. § 1144. *See generally* Irish & Cohen, *ERISA Preemption: Statutory Rigidity and Judicial Flexibility*, 19 Mich. J. L. Reform 109 (1985).

[21] The provisions of ERISA are intricate and complex. For a clear and careful explanation of accruals, vesting, funding, and insurance coverage of pension benefits, see the excerpt from the En Banc Brief of Amicus Curiae National Employee Benefits Institute at 3-8, *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *reh'g en banc granted*, 836 F.2d 1571 (1988) (86-8123). App. F.

and participants. In 1974 Congress chose to preserve long-standing rules by codifying existing Treasury Regulations which accelerated vesting schedules for certain benefits upon plan termination and permitted excess assets which were the result of overfunding to revert to the employer.[22] In 1986 and again in 1987 Congress adjusted that balance by providing more protection for employees and imposing additional obligations upon employers that terminate private pension plans while still preserving the basic right of employer reversions.[23]

The court below ignored this broad and carefully structured framework, and focused solely on a narrow, inapposite provision of Title IV of ERISA to create a new substantive right for employees to recover surplus plan assets upon termination. That result not only upsets the delicate balance established by Congress, but also has important systemic ramifications for all well-funded private pension plans.

A. The Decision Below Conflicts with Thousands of Rulings by the IRS and the PBGC and Will Spawn Burdensome Litigation

Mead's Plan was a defined benefit pension plan qualified

[22] Treas. Reg. § 1.401-2(b). ERISA § 1012(a), adding I.R.C. § 411(d)(3). According to the Conference Committee's 1974 Report, "[u]nder the conference substitute, as under present law, all accrued benefits in a qualified pension plan must become fully vested . . . in the event of a plan termination or the complete discontinuance of contributions under the pension plan." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 277, (1974) *reprinted in* Comm. on Labor and Pub. Welfare, 94th Cong., 2d Sess., 3 Legislative History of the Employee Retirement Income Security Act of 1974, at 4544 (1976) ("ERISA Leg. Hist.").

[23] The Single Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 222 (1986); The Tax Reform Act of 1986, Pub. L. No. 99-514, § 1132(a), 100 Stat. 2936 (1986); The Pension Protection Act, enacted as Title IX, Subtitle D, Part II of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

under the Internal Revenue Code of 1954 (the "Code")[24] for favorable tax treatment.[25] Each such plan is typically submitted to the Internal Revenue Service ("IRS") upon adoption, amendment, and again upon termination for a determination that it meets all of the Code's qualification rules. One of those rules is that at plan termination all participants' benefits that constitute plan liabilities must be satisfied before surplus assets may revert to the employer.[26] The Plan at issue was submitted to the IRS upon termination, and Mead received a favorable determination letter. App. G. That letter constituted a ruling by the IRS that all benefit liabilities required under the Code had been provided to participants in the Mead Plan.[27]

Mead's Plan was also covered by PBGC termination insurance under Title IV of ERISA.[28] At the time of the Mead Plan termination, the termination process required express PBGC

[24] 26 U.S.C. §§ 1 *et seq.*

[25] Generally defined benefit pension plans are those that promise a stated benefit at normal retirement, calculated pursuant to a formula set forth in the plan. *See* I.R.C. § 414(j); *See also* J. Gee, *supra* note 19, at 7.

[26] The regulations under Code Section 401(a)(2) provide that after all liabilities of a terminating plan have been paid, assets may revert to the employer. Treas. Reg. § 1.401-2(b) (as amended in 1980). Although the term "liabilities" includes both fixed and contingent obligations to employees, the only contingent liabilities that must be paid on plan termination are "the benefit credits *accrued* up to the time of termination of the trust. . . ." Rev. Rul. 71-152, 1971-1 C.B. 126 (emphasis added). This ruling was revoked and superseded by Rev. Rul. 83-52, 1983-1 C.B. 87 and Rev. Rul. 85-6, 1985-1 C.B. 133, 10, which restated the same principle.

[27] A favorable ruling upon plan termination is important because only distributions from plans that are qualified at the time of termination may be "rolled over" by participants into individual retirement accounts under Code Section 402(a)(5), thus deferring taxation, or may be afforded special income averaging treatment under Code Section 402(e).

[28] ERISA § 4021(a), 29 U.S.C. § 1321(a).

approval before plan assets could be distributed.[29] Upon the termination of an overfunded pension plan it was necessary to secure a ruling from the PBGC that the assets of the plan were "sufficient" to pay out all legally required benefits under the plan; any surplus over this amount could revert to the employer if the plan so provided.[30] In this case the PBGC issued the appropriate "notice of sufficiency" in connection with termination of the Mead Plan, thereby ruling that all required benefits had been paid out and that the reversion to Mead was proper under Title IV of ERISA. App. H.

Since ERISA was enacted neither the PBGC nor the IRS has ever interpreted or administered any portion of ERISA to require, as did the court below, that unearned "benefit expectations" be payable upon plan termination before surplus plan assets may revert to the employer. The PBGC has consistently interpreted and administered ERISA Section 4044(a)(6) to include only benefits accrued at the date of plan termination.[31] As recently as September 25, 1987, the IRS ex-

[29] ERISA § 4041(a), 29 U.S.C. § 1341(a) (as in effect in 1983). It is still necessary to submit a plan to the PBGC upon plan termination. An actuary enrolled under ERISA must certify to the sufficiency of plan assets. If the PBGC does not question the actuary's certification, benefits may be distributed. ERISA § 4041(b), 29 U.S.C. § 1341(b) (1988).

[30] ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1) (1983).

[31] PBGC Opinion Letter No. 87-11 (Oct. 22, 1987), *reprinted in* 15 Pens. Rep. 260 (BNA) (Feb. 1, 1988), states:

> Section 4044(a) does not create benefit entitlements not otherwise provided for elsewhere in ERISA or under the plan. ERISA does not require benefit accruals per se based on service not actually completed under a plan. . . . Section 4044(a)(6) accordingly does not require the allocation of assets to pay benefits that might have accrued in the future if the Plans had not terminated and the participants had continued performing covered service. Consequently, such "unaccrued benefits" cannot be considered "liabilities of the plan to participants and their beneficiaries" under Section 4044(d)(1).

App. K at 45a. *Accord* PBGC Brief Below at 12-13; PBGC Opinion Letter 86-1 at 1 (Jan. 15, 1986). App. K at 47a. *See also* note 38, *infra*.

plicitly stated in a General Counsel's Memorandum that benefits payable upon plan termination do not include "benefit expectations."[32]

Neither the wording nor the meaning of Section 4044(a)(6) has changed since ERISA was passed in 1974. Over 50,000 plans have terminated since then. PBGC's Brief Below at 4. PBGC statistics on reversions, which are compiled only for "large" cases where asset reversions to employers exceed $1 million, show that from 1980 through 1987, 1,500 such plans have terminated. These larger plan terminations involved $35 billion in assets; 1.7 million employees received more than $19 billion in benefits, and employers received more than $16 billion in surplus asset reversions.[33] The situation is undoubtedly comparable for thousands of "smaller" plans.

The Fourth Circuit's novel construction of Section 4044(a)(6) creates a clear conflict with the consistent application of that provision by the PBGC and the IRS. Thus, the decision below calls into question the legality of the thousands of rulings made by the IRS and the PBGC with respect to

[32] In Gen. Couns. Mem. 39665 at 2-3 (Sept. 25, 1987), the IRS stated:

> Section 4044(a) of ERISA, with its allocation requirements, should not be seen as increasing the term liabilities to include "benefit expectations." The section was intended to protect the Pension Benefit Guaranty Corporation from financial responsibility for guaranteed benefits when there were sufficient plan assets in the plan to pay these benefits. . . . Nothing in the legislative history of ERISA supports the view that section 4044(a) creates substantive requirements as to what constitutes a liability.

Indeed after the decision below was rendered, the IRS took the extraordinary step of suspending issuance of determination letters with respect to plan terminations in the Fourth and Eleventh Circuits until its contrary view was published in the General Counsel's Memorandum. *See Plan Terminations on Hold in Fourth, Eleventh Circuits*, 14 Pens. Rep. (BNA) 1107 (Aug. 24, 1987). For an explanation of litigation in the Eleventh Circuit raising similar issues, see *infra* pp. 15-17.

[33] 8 Employee Benefit Notes 3 (EBRI) (Dec. 1987).

prior plan terminations and the distributions made pursuant to and in reliance upon them.[34]

According to the PBGC most terminating defined benefit plans include some type of early retirement benefit. PBGC's Brief Below at 4. To revisit all of those plan terminations would be a monumental, if not impossible, task for the PBGC, the IRS, plan fiduciaries, and plan participants.[35] Even after recalculation of benefits, the courts would presumably have to be used to recapture reversions from employers (which may no longer be in existence) and to locate thousands of former plan participants or their heirs. Only after these steps were completed could the newly-recaptured plan assets be redistributed.

B. Unless Reversed, the Decision Below Will Frustrate ERISA's Uniform Application and Create Significant Inequities with Respect to Benefits Payable from Terminating Plans

In addition to insuperable difficulties as to past terminations, the decision below will create serious administrative difficulties and inequities with respect to future plan terminations. It will frustrate the uniform treatment of terminating

[34] In the Fourth Circuit alone 64 "large" plans have terminated since 1980, paying $758 million to 86,000 employees, and $516 million to employers in the form of asset reversions. App. I.

[35] The principle of repose represented by the statute of limitations might normally mitigate these problems. However, ERISA follows the practice of borrowing "applicable" state statutes of limitations. *See, e.g., Miles* v. *N.Y. State Teamsters Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Jenkins* v. *Local 705 Int'l Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). This fact poses several serious administrative problems: (1) the "applicable" limitation period within any given state may be uncertain; (2) the "applicable" limitation periods will vary widely from state to state, frustrating uniformity; and (3) it is likely that more than one state statute of limitations would be held to apply to termination of the same pension plan depending, *inter alia*, on the residence of plan participants.

plans subject to ERISA. Except in the Fourth Circuit, benefits on plan termination will be limited to benefits enumerated specifically in ERISA. In the Fourth Circuit (or in any other jurisdiction that adopts the reasoning of the court below), however, benefits on plan termination will be greater than required by ERISA and will include at least participants' "benefit expectations" in the form of subsidized early retirement benefits that have not been earned.

In fact the Fourth Circuit's approach requiring the payment of "benefit expectations" is difficult to confine to subsidized early retirement benefits. If extended by other courts, that approach could require an employer to use plan assets to pay all possible future benefits that might ever be earned under a plan. Although erroneous, that precise conclusion was reached by a panel of the Eleventh Circuit in *Blessitt* v. *Retirement Plan For Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), which, like the Fourth Circuit, relied on the dictum in *Amato* construing ERISA Section 4044(a)(6). In *Blessitt* the panel's opinion held that "if assets remain, *employees should be paid benefits promised under the plan but not yet accrued* before the employer receives the residual assets in the fund." *Id.* at 1531 (emphasis added).[36] That opinion was vacated and rehearing en banc was granted on January 20, 1988. 836 F.2d 1571 (11th Cir. 1988). Oral argument was held before the Eleventh Circuit en banc on February 23, 1988. As of the date of filing this petition, the Eleventh Circuit has not rendered its en banc decision.

The mistake of law that originated in the *Amato* dictum and that was adopted by the Fourth Circuit below and by the Eleventh Circuit panel in *Blessitt*, has caused great confusion

[36] For example *all* additional future benefits that would have been accrued between the time of plan termination and age 65 would constitute "benefit expectations" under *Blessitt*. By requiring that "benefit expectations" that would be earned if the plan continued be paid upon plan termination, this approach eviscerates the termination and penalizes the employer for exercising its legal right to terminate a plan.

and concern in the pension community and has been the subject of widespread critical commentary.[37] Requiring the funding of "benefit expectations" on plan termination effectively nullifies ERISA Section 4044(d)(1), which specifically states that "[a]ny residual assets of a single employer plan may be distributed to the employer if . . . all liabilities of the plan to the participants and their beneficiaries have been satisfied." App. D. Congress, the IRS, the Department of Labor, the PBGC, and federal courts have consistently sanctioned reversions of surplus plan assets to employers despite much pressure and repeated attempts to prohibit such reversions.[38]

In the past year class actions have been filed in both the

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[37] *See, e.g., Employer May Recapture Residual Pension Plan Assets After Payment of "All Benefit Commitments"*, Spencer's Res. Rep. on Employee Benefits 161.3-7 (Sept. 1987); Walshe, *Recent Court Decisions May Affect Employer Pension Reversions*, 1 Coopers & Lybrand Benefits Briefing 4 (1987); Coleman, *From Amato to Blessitt: Out of the Frying Pan, Into the Fire*, 15 Tax Mgt. Comp. Plan. J. 343 (1987); *Asset Reversions: Whose Money Is It Anyway?*, 14 Employee Benefits Rep. 4 (Sept. 1987); *Court Rulings Limit Plan Termination Reversions*, 15 Tax Mgt. Comp. Plan. J. 327 (1987); Royster, *How Does the Blessitt Decision Affect Plan Sponsors?*, Pension World 52 (Nov. 1987).

[38] PBGC, IRS and Labor Department [Implementation] Guidelines, *reprinted in* 11 Pens. Rep. 724 (BNA) (May 28, 1984). On four separate occasions, in 1938, 1942, 1974, and 1987 Congress rejected attempts to prohibit employer reversions. *See* En Banc Brief of Amicus Curiae Association of Private Pension and Welfare Plans at 8-19, in *Blessitt*. In 1987 Senate Finance Committee members stated, "[t]he present law standards as reflected in the Implementation Guidelines, and the present-law excise tax on reversions, are appropriate rules for addressing the issue of employer access to excess plan assets." S. Rep. No. 63, 100th Cong., 1st Sess. 193 (1987). To date, six circuits have expressly recognized employers' rights to reversions of surplus assets upon plan termination. *See Chait* v. *Bernstein*, 835 F.2d 1017 (3d Cir. 1987); *Wilson* v. *Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987); *UAW* v. *Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984); *LLC Corp.* v. *PBGC*, 703 F.2d 301 (8th Cir. 1983); *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 729 F.2d 863 (D.C. Cir. 1984); *Pollock* v. *Castrovinci*, 622 F.2d 575 (2d Cir. 1980); *In re C.D. Moyer Co. Pension Trust*, 582 F.2d 1273 (3d Cir. 1978). *But see Bryant* v. *Int'l Fruit Products Co.*, 793 F.2d 118 (6th Cir.), *cert. denied*, 107 S. Ct. 576 (1986); *Audio Fidelity Corp.* v. *PBGC*, 624 F.2d 513 (4th Cir. 1980).

Fourth and Eleventh Circuits by employees seeking vast amounts in payment of unearned "benefit expectations" not distributed to them when overfunded plans terminated.[39] The federal courts will be burdened with such claims until this Court reconciles the conflict between the Fourth Circuit's decision below and the administration of the statute by the PBGC and the IRS.

C. The Decision Below Will Result in Less Securely Funded Pension Plans

The requirement to pay "benefit expectations" would probably insure, as a practical matter, that no pension plan reversions to employers would ever occur. *See* App. J. If it ceases to be clear that surplus assets are permitted to revert to employers at plan termination, employers will alter their funding methods and assumptions to the disadvantage of the entire pension system. Under Code Section 412 employers and actuaries have broad latitude in selecting the actuarial methods and assumptions to be used in funding pension plans. Instead of using funding methods and assumptions that in effect provide advance funding for future accruals and liabilities, thereby often creating surpluses if plans are terminated, employers will adopt methods and assumptions that will result in slower funding, with less chance that there will be any surplus assets at termination. The result will be that plans throughout the system will be less securely funded. As Judge Becker recently warned, "[a]n employer that knew that it was prohibited from recapturing the surplus might be tempted to underfund its plan — a result that would benefit no one." *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1987).

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[39] *See, e.g., Simpson* v. *Am. Express Co.*, No. 88-6062 (S.D. Fla. filed Feb. 1. 1988) (20,000 + member class action). *Franklin* v. *United States Sugar Corp.*, No. 88-12002 (S.D. Fla. filed Jan. 5, 1988) (2,500 + member class action); *Charleston Nat'l Bank* v. *Heck's Inc.*, No. 87-0173 (Bankr. S.D. W. Va. filed Sept. 23, 1987) (5,300 + member class action); *Linkous* v. *The Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987) (400 + member class action).

II. THE FOURTH CIRCUIT'S TREATMENT OF SUBSIDIZED EARLY RETIREMENT BENEFITS UNDER ERISA SECTION 4044(a)(6) CONFLICTS WITH THE RETIREMENT EQUITY ACT OF 1984 ("REA") THUS CREATING FURTHER INTERFERENCE WITH UNIFORM APPLICATION OF FEDERAL PENSION LAW

ERISA has been amended periodically, most recently by the Pension Protection Act, *supra* note 23. The general thrust of every significant substantive amendment to ERISA by Congress has been to expand the entitlement of employees to plan benefits and to increase the legal or financial obligations of employers and others entrusted with responsibility for plan administration.

A. REA Expanded Protection of Early Retirement Benefits

One amendment of ERISA directly relevant to this case was included in the Retirement Equity Act of 1984 ("REA")[40] which was enacted after the Mead Plan termination. A key provision of REA provides specific statutory protection for unreduced (subsidized) early retirement benefits[41] — the very benefits sought by respondents below. REA's protection of subsidized early retirement benefits is significantly more limited than the sweeping relief granted by the Fourth Circuit below, and thus stands in direct conflict with it.

Subsidized early retirement benefits that are protected under REA cannot be reduced by plan amendment or eliminated by plan termination. *See supra* note 41. When a plan is terminated under circumstances where employment with the plan sponsor continues, REA gives each participant the opportunity *to earn* subsidized early retirement benefits if, at a later date after plan termination, the paticipant fulfills the particular age and service criteria set forth in the plan.[42]

[40] Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of Titles 26 and 29 U.S.C.).

[41] REA § 301(a), amending ERISA § 204(g), 29 U.S.C. § 1054(g) and I.R.C. § 411(d)(6). This provision of REA operates prospectively; it only applies to plan terminations occurring after July 30, 1984. REA § 302(d)(1). The Mead Plan was terminated on August 1, 1983, prior to the effective date of REA.

Since REA's enactment sponsors of a terminating plan are permitted to direct the plan trustees to purchase for participants annuities containing contingent subsidized early retirement benefits that will become payable only if and when the plan's age and service requirements are later met. As was the case before REA, sponsors may also elect a more expensive course and amend the plan (if the amendment does not favor highly compensated employees) to remove the criteria for the contingency altogether and pay full, unreduced benefits upon plan termination.[43] The court below forced upon Mead, without its consent and without IRS approval, the latter course by mandating that the Plan's age and service criteria be ignored.

REA's protection does not interfere with the employer's right to terminate the plan, nor does it assume all participants will ultimately fulfull the plan's criteria for subsidized early

[42] S. Rep. No. 575, 98th Cong., 2d Sess. 28, 31, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574, 2577. In the instant case respondents would not have been entitled to relief even if REA had applied to Mead's Plan termination; retirement from Mead after age 62 was impossible for these respondents because their employment was severed when Mead sold the Foundry. The Senate Report states that, when employment is severed before a participant meets the plan's requirements for an unreduced early retirement benefit, the participant is not entitled to the benefit. *Id.* at 29, 2575.

[43] Rev. Rul. 85-6, 1985-1 C.B. 133. Similarly, when an employer splits one plan into two through a "spinoff" of assets and liabilities under Code Section 414(l), the benefits that must be included and funded in the spinoff include early retirement benefits that participants may earn and accrue in the future through subsequent service with the employer. Rev. Rul. 86-48, 1986-1 C.B. 216.

retirement benefits. In fact by requiring that subsidized early retirement benefits be paid in the future only to employees who earn them, REA implicitly recognizes that many employees will never satisfy the necessary criteria. Because the decision below adopts precisely the opposite assumption, however, it creates significant new rights for every participant of a terminating plan and seriously interferes with employers' previously unquestioned right to recoup surplus plan assets.

No statutory protection for subsidized early retirement benefits existed before REA. Nevertheless the court below ordered Mead to pay subsidized early retirement benefits that had not been earned, a result not provided for under ERISA even after the protection added by REA took effect.

B. The Fourth Circuit's Reading of ERISA Section 4044(a)(6) Conflicts with REA

Congress would hardly have found it necessary to enact a new law providing protection for future *earned* subsidized early retirement benefits with respect to plan terminations after July 30, 1984, if, as the Fourth Circuit believed, the law before July 30, 1984, required payout on plan termination of *unearned* early retirement benefits. In other words the decision below can be correct only if the law prior to REA required more generous benefit payouts than the law after REA requires. This anomalous result cannot have been the intent of the Congress that enacted REA, for it undoutedly meant to expand benefits, not contract them.[44]

Even if the decision below is confined to subsidized early retirement "benefit expectations," severe problems and inequities similar to those described above will persist. *See supra* pp. 13-17. The rules applied to terminating plans in the Fourth Circuit will be in irreconcilable conflict with ERISA as amended by REA. That result is intolerable given Congress' intention to create a uniform standard applicable throughout the nation.

[44] S. Rep. No. 575, *supra* note 42, at 2547.

III. THE FOURTH CIRCUIT MISINTERPRETED THE CONGRESSIONAL INTENT UNDERLYING ERISA SECTION 4044(a)(6)

The decision below rests squarely on the Fourth Circuit's conclusion that ERISA Section 4044(a)(6) requires payments in excess of benefits that have been earned upon the termination of a pension plan. Quite aside from the fact that both the statutory scheme of ERISA and the enactment of REA flatly refute that theory, the Fourth Circuit's review of the legislative history of Section 4044(a)(6) is perfunctory, inadequate, and wrong.

Section 4044(a) was enacted primarily to protect the PBGC.[45] When a plan terminates, Section 4044(a) requires plan assets to be allocated so that, to the extent possible, they are used first to pay benefits insured by the PBGC. Section 4044(a) requires that the assets of a terminating plan be allocated to fund six categories of benefits in a specified priority. If plan assets exceed benefits in the first category, they are applied to the second, and so on, until all six categories are funded. Thereafter any surplus remaining may revert to the employer under ERISA Section 4044(d)(1). The last of the six categories, Section 4044(a)(6), is "all other benefits under the plan."

The Fourth Circuit's analysis of the legislative history merely parrots *Amato* and ignores the fact that the congressional purpose in enacting Section 4044(a) was to protect the PBGC, not to create additional, unearned benefits. This analysis begins and ends with a true but legally irrelevant fact — that an earlier House of Representatives' version of Title IV of ERISA proposed a separate termination allocation

[45] Section 4044's purpose is "[t]o protect against evasion of the . . . limits on [PBGC] insurance benefits by use of pension fund assets to first pay uninsured benefits. . . ." S. Rep. No. 383, 93d Cong., 2d Sess. 84, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4968, and 1 ERISA Leg. Hist. at 1152. *See also supra* note 32.

category for other "accrued benefits,"[46] and the word "accrued" does not appear in a different (and subsequent) bill ultimately enacted as Section 4044(a)(6). This fact, according to *Amato* and the court below, signified that Congress intended surplus assets to be used to pay out something more than "accrued" benefits upon plan termination.[47]

The legislative history of Section 4044 is actually far more complex than the Fourth Circuit described and suggests that the term "accrued" was omitted by Congress because there *can* be other plan benefits that fall into Section 4044(a)(6). Section 112(b)(4) of H.R. 2., *supra* note 46, which contained the "accrued benefits" language, also contained additional language defining another, lower-priority allocation category consisting of benefits that "the plan may set forth as . . . payable only if the plan terminates."[48] The final version enacted

[46] H.R. 2, 93d Cong., 2d Sess. § 112(b)(4), 61 (1974), *reprinted in* 3 ERISA Leg. Hist. at 3958.

[47] *Tilley*, 815 F.2d at 991-92, *quoting Amato*, 773 F.2d at 1416, App. A at 6a. Aside from its incorrect reading of the legislative history, the court below was on tenuous ground in attaching such overriding significance to the disappearance of one word from an unenacted bill. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers"); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 474 (11th Cir. 1984) ("Unexplained changes made in committee are not reliable indicators of congressional intent"). *Accord In Re Timbers of Inwood Forest*, 793 F.2d 1380, 1400 n. 37 (5th Cir. 1986) (reinstated upon reh'g en banc, 808 F.2d 363 (5th Cir. 1987)), *aff'd*, 108 S. Ct. 626 (1988); N. Singer, *Sutherland Statutes and Statutory Construction*, § 48.06 (4th ed. Supp. 1988). The legislative history of ERISA is contained in three volumes, comprising over 5,000 pages. Nothing in that mass of material specifically explains the deletion of the word "accrued" from Section 112(b)(4) of H.R. 2.

[48] H.R. 2, 93d Cong., 2d Sess. § 112(d)(2), 63 (1974), *reprinted in* 3 ERISA Leg. Hist. at 3960. For example, a pension plan might by its terms provide that, upon (and only upon) plan termination, each participant is entitled to an additional one-time payment of $1,000.

as Section 4044(a)(6) evidently combined both categories and thus is not limited solely to benefits that have accrued.[49]

Finally when the drafters of ERISA recognized a need for a significant departure from pre-ERISA law, the legislative history reflects that intent.[50] Pre-ERISA law expressly permitted reversion of surplus assets to the employer after all accrued benefits had been paid.[51] If the intent of Section 4044(a)(6) was to require that such assets be used to fund "benefit expectations," surely the legislative history would expressly reflect that purpose as a warning to employers that benefits payable upon termination would exceed benefits actually earned or accrued. The legislative history contains no such warning.

The PBGC in its amicus brief on rehearing below, expressly advised the Fourth Circuit that the panel's construction of Section 4044(a)(6) conflicted with the PBGC's longstanding and consistent construction of that section. *See supra* p. 8. By denying Mead's petition for rehearing, the court below erroneously disregarded the PBGC's expert construction of ERISA and substituted its own.[52]

[49] For a more expansive discussion of the legislative history of Section 4044(a)(6), see the PBGC's Brief Below at 6-9.

[50] Compare the discussion of Section 4044(a)(6), H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 375, *reprinted in* 3 ERISA Leg. Hist. at 4642, with the discussions on: vesting, *id.* at 267-79, 3 ERISA Leg. Hist. at 4534-46, and 4693; prohibited transactions, *id.* at 306-23, 3 ERISA Leg. Hist. at 4573-90; and salary reduction plans, *id.* at 355-56, 3 ERISA Leg. Hist. at 4622-23.

[51] Treas. Reg. § 1.401-2(b)(2); Rev. Rul. 71-152, 1971-1 C.B. 126.

[52] This Court has held that the federal courts are not free to substitute their judgments as to statutory construction for those of the responsible federal agencies; indeed, under this Court's decisions, the agencies' views command great deference. *See, e.g.*, *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 262 (1985); *Chevron, U.S.A., Inc.* v. *National Resources Defense Counsel, Inc.*, 467 U.S. 837, 843-45 (1984). *See also Nachman Corp.* v. *PBGC*, 446 U.S. 359, 373-74 (1980). Other courts of ap-

There are a variety of reasons that naturally cause many pension plans to become overfunded.[53] The pension community, the bar, and the lower federal courts have a pressing need for guidance from this Court on the proper rules to apply with respect to benefits payable from such plans upon termination. For similar reasons clear rules about terminations and reversions of surplus plan assets are necessary to assure the proper treatment of overfunded plans in connection with merger and acquisition transactions, where prices and liabilities may be significantly affected by the legal treatment of such surpluses. Moreover a failure to reverse the court below will undermine strong funding of pension plans throughout the private pension system.

The result reached by the Fourth Circuit is squarely at odds with the statutory scheme established in ERISA and with the views of the federal agencies charged with administering it. The opinion below — although rendered in almost casual disregard for the basic concepts and operation of the federal pension law — can perhaps best be understood as a case involving relatively small sums sought by employees who fell just short of meeting specific criteria for receiving plan benefits. Yet the rules formulated in such a case can have an enormous adverse impact on the soundness of the entire pension system when applied later in class-action settings. That trend is already underway, and can only accelerate absent prompt review by this Court.

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peal have given great deference to the PBGC's construction of ERISA. *See, e.g., Gen. Motors* v. *Cal. Bd. of Equalization*, 815 F.2d 1305, 1310 (9th Cir. 1987), *cert. denied sub nom., Gen. Motors* v. *Bennett*, 108 S. Ct. 1122 (1988); *Flying Tiger Line* v. *Teamsters Pension Trust Fund*, 830 F.2d 1241, 1248 n. 12 (3d Cir. 1987); *Robbins* v. *McNicholas Transp. Co.*, 819 F.2d 682, 686 (7th Cir. 1987); *Rettig* v. *PBGC*, 744 F.2d 133, 140-41 (D.C. Cir. 1984); *Concord Control, Inc.* v. *Int'l Union, UAW*, 647 F.2d 701, 704 (6th Cir.), *cert. denied sub nom., Concord Instruments Corp.* v. PBGC, 454 U.S. 1054 (1981); *Connolly* v. *PBGC*, 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

[53] Coleman, *From Amato to Blessitt: Out of the Frying Pan, Into the Fire*, 15 Tax Mgt. Comp. Plan. J. 343, 343 (1987).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

87 1868 (2)

NO. ________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE MEAD CORPORATION,
Petitioner

vs.

B.E. TILLEY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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APPENDIX A

B.E. TILLEY; David H. Wall; William L. Crotts; Chrisley H. Reed; J.C. Weddle; William D. Goode, Plaintiff-Appellant,

v.

The MEAD CORPORATION, Defendant-Appellee.

No. 86-3858.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 6, 1987.

Decided April 9, 1987.

Former employees brought action against employer seeking early retirement benefits. The United States District Court for the Western District of Virginia, James C. Turk, Chief Judge, entered summary judgment for employer and appeal was taken. The Court of Appeals, Chapman, Circuit Judge, held that employer which terminated employer funded, defined pension plan containing early retirement benefits, and which recouped nearly $10 million as a result, was obligated to pay early retirement benefits to employees who had worked required 30 years at time plan was terminated.

Reversed and remanded with instructions.

1. **Internal Revenue [Key]* 3038**

There is strong presumption in favor of validity of treasury regulations.

2. **Pensions [Key] 66**

Employer which terminated employer funded, defined pension plan containing early retirement benefits, and which recouped $10 million after termination of plan, was obligated

* West Key Number System.

to pay early retirement benefits to employees who worked required 30 years at time plan was terminated under provision of Employee Retirement Income Security Act. Employee Retirement Income Security Act of 1974, §§ 4044, 4044(a), 29 U.S.C.A. §§ 1344, 1344(a).

3. **Pensions [Key] 131**

In determining amounts due each of plaintiffs improperly excluded from consideration for early retirement benefits by employer, upon termination of employer funded pension plan, employees' lump-sum retirement payments should have been determined by reducing each employee's benefit from early retirement age of 62, except for one plaintiff whose benefits would be computed using age 64, since he would not complete 30 years of service until that age.

Clifford Lee Harrison (Spiers, Stone & Hamrick, Radford, Va., on brief), for plaintiff-appellant.

Charles J. Faruki (Kevin F. O'Neill, Smith & Schnacke, Dayton, Ohio, Bernard C. Baldwin, III, Edmunds & Williams, Lynchburg, Va., on brief), for defendant-appellee.

Before WIDENER and CHAPMAN, Circuit Judges, and SIMONS, District Judge for the District of South Carolina, sitting by designation.

CHAPMAN, Circuit Judge:

The appellants are six former employees of The Mead Corporation. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., they seek relief in the form of early retirement benefits from The Mead Corporation Salaried Retirement Plan (the Plan), which was funded entirely by employer contributions and contained a formula setting forth the specific benefits to be received by the participants upon retirement. Under the Plan, the normal retirement age was sixty-five, but under Article V § 2(b) participants with thirty years of service and of age sixty-two could retire with full benefits. In 1983 Mead terminated the Plan and paid early retirement benefits only to those

employees who had met both the age and years of service standards. All other employee retirement benefits were determined actuarially as if they would have retired at age sixty-five. There was ten million dollars left in the fund after the payment of all benefits and this amount was recouped by Mead. The six plaintiffs, except W.L. Crotts[1], had each worked more than thirty years at the time the Plan was terminated, but none had reached the age of sixty-two. They claim that under 29 U.S.C. § 1344(a), which determines the allocation of plan assets upon plan termination, they are entitled to early retirement benefits and Mead is required to compensate them for loss of these early retirement benefits. We agree and reverse.

I.

In 1968, The Mead Corporation (Mead) acquired Lynchburg Foundry Company (Foundry) at which the appellants were salaried employees. The Foundry became a wholly owned subsidiary of Mead and thereafter Mead established the Plan, which was funded entirely by Mead. The appellants were covered by the Plan under which normal retirement was fixed at age sixty-five. Article V § 2(b) of the Plan allowed unreduced early retirement benefits to those employees covered by the Plan who had attained age sixty-two and had thirty years of service. It provided:

> "If a Participant with thirty (30) or more years of credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to [full benefits]."

In June 1983, Mead announced the Foundry had been sold to another corporation, and the following month, Mead gave notice to all salaried employees (including plaintiffs) that the Plan would be terminated August 1, 1983.

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[1] Plaintiff Crotts was employed July 1, 1955 and had 28 years and one month of company service and was 61 years of age when the Plan was terminated.

After securing approval from the Pension Benefit Guaranty Corporation, Mead made lump-sum payments to each plaintiff for all benefits Mead determined were due under the Plan. These benefits were not insubstantial and ranged from $50,800.35 for plaintiff Weddle to $87,552.03 for Mr. Crotts. These lump sum benefits were figured on a retirement age of sixty-five and the plaintiffs contend that the retirement benefits should have been determined as of the early retirement age of sixty-two (62). The difference sought by plaintiffs is determined by figuring the actuarial reduction of about five percent per year from the early retirement date of sixty-two (62) rather than from age sixty-five (65). This difference totals $56,476.92 for the six plaintiffs.

Mead contends that the following agreed facts relieve it from any further responsibility to the six plaintiffs:

(1) The sale of the Foundry did not violate ERISA;

(2) Mead had the right to amend or terminate the Plan at any time;

(3) None of the plaintiffs had attained age sixty-two (62) by the time of Plan termination;

(4) Mead never promised or guaranteed to any of the plaintiffs continued employment lasting until age sixty-two (62);

(5) Plaintiffs had no right to continued employment with Mead after termination of the Plan and sale of the Foundry;

(6) Plaintiffs had no right to continued accrual of benefits after Plan termination;

(7) Each plaintiff conceded that he had no facts to indicate Mead acted in bad faith with regard to the calculation and/or distribution of benefits under the Plan.

The Plan retained ten million dollars in funds after payment of all the benefits (excluding the early retirement benefits). Mead recouped these remaining plan assets.

The district court granted summary judgment in favor of

Mead on the grounds that the early retirement benefits were not "accrued benefits" under ERISA because the appellants individually had not reached the requisite age and service-years standard established in the Plan. On appeal, the appellants argue that contingent early retirement benefits are a "benefit" which must be distributed upon plan termination.

II.

When a plan is terminated the order of priority of participants and beneficiaries is set forth in ERISA § 4044(a), 29 U.S.C. § 1344(a) which provides in part:

> In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> * * *
>
> (5) Fifth, to all other nonforfeitable benefits under the the plan.
>
> (6) Sixth, to all other benefits under the Plan.

It is obvious from these two sections that there is a difference between "nonforfeitable benefits" and "all other benefits under the Plan". In a persuasive opinion, the Second Circuit in *Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1414-16 (2nd Cir. 1985), held that this "category six" included early retirement benefits, even if those benefits were not accrued at the time of termination. The court pointed to the legislative history applicable to § 4044:

> The Joint Explanatory Statement of the Senate-House Conference Committee on the history of ERISA § 4044 supports appellants' argument that category six is not limited to accrued benefits. H.Conf. Rep. No. 1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S.Code Cong. & Ad. News, 5038, 5154-55. The House version of the bill included among the benefits for which funds had to be

> allocated a category entitled "other accrued benefits." The Conference rejected this version and substitued "all other benefits under the Plan," the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

773 F.2d at 1416.

Pension plans are usually submitted to the Internal Revenue Service to be sure that the corporate contributions to such plans are deductible in determining the taxable income of the corporation. The Internal Revenue Code, 26 U.S.C. 401 *et seq.*, sets forth the requirements for qualification of pension plans and Treasury Regulations relating to such plans are found in the Code of Federal Regulations. 29 C.F.R. § 2618.16 (1984) provides:

> "The benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable."

[1] There is a strong presumption in favor of the validity of Treasury Regulations.

> [E]ver since the inception of the Tax Code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.

Bob Jones University v. *U.S.*, 461 U.S. 574, 596, 103 S.Ct. 2017, 2031, 76 L.Ed. 57 (1983).

Mead argues that our decision in *Sutton* v. *Weirton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th

Cir. 1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), controls the outcome of this case. In *Sutton*, we held "the accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits." 724 F.2d at 410.

[2] We do not find *Sutton* controlling. The present case, unlike *Sutton*, does not involve the question of the employer's right to modify early retirement benefit in an unfunded scheme of pension and severance benefits contained in a collective bargaining agreement. We are faced with the termination of an employer funded, defined pension plan which contains early retirement benefits, which plan was terminated resulting in recoupment by the employer of ten million dollars. The application of category six of ERISA § 4044 is controlling in our case, but it was not relevant to or mentioned in *Sutton*.

It is clear from the language of the statute, the general legislative history and the interpretation given to it by the Internal Revenue Service that the persent plaintiffs are entitled to the early retirement benefits they seek.

[3] In determining the amounts due to each of the plaintiffs, Mead excluded from consideration early retirement benefits and reduced the amount received by each plaintiff by an amount equal to roughly five percent per year that the individual was in age short of age sixty-five. The plaintiffs, except Crotts, were entitled to have early retirement benefits considered in determining the amount of their lump sum retirement payment. The correct computation of the benefit should have been determined by reducing each plaintiff's benefit from age sixty-two, except Crotts whose benefits would be computed using age sixty-four, since Crotts would not complete thirty years of service until that age. In other words, the early retirement age benefits should be determined by figuring the actuarial reduction of five percent per year from the early retirement age of the plaintiff, rather than from age sixty-five.

We reverse the decision of the district court, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CIVIL ACTION NO. 84-0751

B. E. TILLEY, ET AL.,
Plaintiffs,
v.
THE MEAD CORPORATION,
Defendant.

FINAL JUDGMENT AND ORDER
(Filed April 18, 1986)

By: James C. Turk, Chief U.S. District Judge

In accordance with the memorandum opinion filed this day, it is hereby

ADJUDGED AND ORDERED

that the plaintiffs' motion for summary judgment shall be and hereby is DENIED and that the defendant's motion for summary judgment shall be and hereby is GRANTED.

The Clerk of Court is directed to enter judgment in favor of the defendant, to strike this case from the court's active docket, and to send certified copies of this order and the accompanying memorandum opinion to counsel of record.

ENTER: This 18th day of April, 1986.

/s/ JAMES C. TURK
Chief U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CIVIL ACTION NO. 84-0751

B. E. TILLEY, ET AL.,

Plaintiffs,

v.

THE MEAD CORPORATION,

Defendant.

MEMORANDUM OPINION

(Filed April 18, 1986)

By: James C. Turk, Chief U.S. District Judge

This case is presently before the court on cross-motions for summary judgment on the plaintiffs' claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1] The parties have submitted briefs, the court has heard oral argument, and the motions are ripe for decision.

The facts in this case are undisputed. The Pension Plan in issue is a non-contributory, defined benefit plan — one funded entirely by the employer and containing a formula setting forth the specific benefits to be received by the participants upon retirement. Under Art. V, § 2(b) of the Plan, a participant could elect early retirement without any reduction of benefits once he reached both age 62 and thirty (30) or more years of Credited Service.

In 1983 Mead, having decided to sell the Lynchburg Foundry Company and to terminate the Plan, gave notice to the

[1] By an agreed order filed February 24, 1986, the plaintiffs' common law contract claims and claims for punitive damages were dismissed.

plaintiffs that the Plan would be terminated. At the time of termination, none of the plaintiffs had reached age 62.[2] Each plaintiff received lump-sum benefits from the employer at the time the Plan was terminated. The plaintiffs have stated that this action was brought to obtain an increase in the amount or level of the lump-sum benefits.

Section 4(f) of the Plan provides:

> (f) Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

The plaintiffs argue that the early retirement provision of § 2(b) is a contingent right accrued under the Plan and must, therefore, be paid prior to any surplus being returned to the employer. The Plan's language, the legislative history, and the caselaw in the fourth circuit, however, clearly demonstrate that early retirement benefits are not "accrued benefits" under ERISA.

The Plan provided for an election of early retirement with unreduced benefits once a participant both reached age 62 and had thirty (30) years of Credited Service. Once both of these prerequisites had been met, the participant could, under Art. IV, § 2, elect in writing to exercise his early retirement option.[3] In effect, reaching age 62 and having thirty years of Credited Service were conditions which must be met before a participant could be said to possess even a contingent

[2] It is also undisputed that none of the plaintiffs had reached age 62 by the time the lump-sum payments were actually paid.

[3] It is undisputed that no plaintiff made such a written election.

benefit of early retirement. At that point the benefit would be contingent upon the written election.

The legislative history of ERISA also supports the argument that the unreduced early retirement benefit was not a benefit accrued under the Plan. Among other things, accrued benefits under ERISA do not include the value of the right to receive early retirement benefits. *See* H.R. Conf. Report No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code, Cong. & Ad. News 5038, 5054.

The United States Court of Appeals for the Fourth Circuit in *Sutton* v. *Weirton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1983), *cert. denied* ____ U.S. ____, 104 S. Ct. 2387 (1984) held that the early retirement benefits at issue were not accrued benefits and, therefore, were not nonforfeitable. The fourth circuit's reasoning in *Sutton* was followed by the third circuit in *Bencivenga* v. *Western Pennsylvania Teamsters*, 763 F.2d 574 (3d Cir. 1985), and *Viggiano* v. *Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276 (3d Cir. 1984).

The court, having carefully considered the language of the Plan, the legislative history, and the fourth circuit's opinion in *Sutton*, finds that the § 2(b) provision for unreduced early retirement benefits is not a contingent right accrued under the plan as to these plaintiffs.[4] Therefore, the plaintiffs are not entitled to any additional sums under the plan.

The plaintiffs also point to the portion of § 4(f) which states that "Any surplus remaining in the Retirement Fund, due to actuarial error, . . . shall, . . . be returnable to the respective Employing Company . . ." The plaintiffs argue that since the surplus was not the result of any actuarial error, as that term is commonly used, then the employer is not

[4] The court notes that Congress has amended ERISA § 204(g), 29 U.S.C. § 1054(g), to include early retirement benefits within its accrued benefits protection for plan years beginning after December 31, 1984. Retirement Equity Act, § 301(a)(2), Pub.L.No. 98-397, 98 Stat. 1450-51 (1984). The court further notes, however, that the amendment does not apply to plan years before January 1, 1985.

entitled to recover the surplus. The argument appears to be that if the surplus cannot be returned to the employer, it should be allocated among the participants in the plan. This argument, however, is without merit for many reasons.

Since the Plan in question was a defined benefit plan, the participants are not entitled to a share of the trust fund. Once the participant's defined benefits have been paid, any surplus from overfunding must be returned to the employer. *See Pollock* v. *Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 575 (2d Cir. 1980). Two sound underlying policies support this rule. First, ERISA is designed to protect only those benefits which have become vested. *Dhayer* v. *Weirton Steel Division of National Steel Corporation*, 571 F. Supp. 316 (N.D. W. Va.), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied* 104 S. Ct. 2387 (1984). It is not designed to provide participants with a windfall due to the employer's error in overfunding the Plan in an attempt to keep it on a sound financial basis. *In re C. D. Moyer Company Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd mem.* 582 F.2d 1273 (3d Cir. 1978). Second, the rule will serve to encourage employers to keep the funds fully funded under ERISA guidelines in that they will not be penalized for overfunding in an "abundance of caution." *Id.*

Furthermore, § 4(f) does not, as the plaintiffs contend, provide that only surplus remaining due to actuarial error is returnable to the employer. In fact, ERISA specifically provides at 29 U.S.C. § 1344(d)(1) that residual funds may revert to the employer when:

(a) the plan's liabilities to participants have been satisfied;

(b) the distribution does not contravene any provision of the law; and

(c) the plan provides for such a distribution in these circumstances.

The plaintiffs have failed to show specific facts demonstrating that these requirements have not been met.

Most fatal to the plaintiffs' argument is that the definition of "actuarial error" as it applies to ERISA cases actually in-

cludes overfunding. The Internal Revenue Service's definition states that "when fixed and contingent liabilities are discharged . . . the remaining assets may be considered surplus arising from actuarial error . . ." Rev. Rul. 83-52, 1983-1 C.B. 87.[5] The sixth circuit in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *Dyneer Corporation*, 747 F.2d 335 (6th Cir. 1984) upheld the application of the IRS definition to ERISA cases, finding that when liabilities have been discharged, the remaining pension plan assets may be considered "surplus arising from actuarial error." Indeed, a plan's overfunding may arise from actuarial error "because actual requirements differ from expected requirements," Treas. Reg. § 1.401-2 (b)(1), or even because of intentional overfunding, *Bryant* v. *International Fruit Products Company*, 604 F. Supp. 890 (S.D. Ohio 1985). Applying the broad IRS definition in this case, the court finds that the surplus did in fact arise from actuarial error.[6] It is, therefore, returnable to the employer.

Based on the foregoing, the court finds that the plaintiffs are not entitled to any sums in addition to the lump-sum benefits which they have already received. The court further finds that the surplus remaining in the fund is returnable to the employer pursuant to the applicable ERISA provision, 29 U.S.C. § 1344(d)(1), and § 4(f) of the Plan. Therefore, the plaintiffs' motion for summary judgment should be DENIED and the defendant's motion for summary judgment should be

[5] Rev. Rul. 83-52 has been modified and superseded by Rev. Rul. 85-6, 1985-1 C.B. 133 to meet the new requirements of § 301 of the Retirement Equity Act of 1984 as discussed *supra* at fn. 4.

[6] The plaintiff places much weight on the defendant's "admission" at oral argument that the surplus was not the result of actuarial error. This amounts to little more than quibbling over semantics. The defendant's statement that there were no actuarial errors made in the calculation of the plaintiffs' lump-sum benefits merely recognizes that the correct discount rate was used to calculate the benefits. The defendant did not state that there was no "actuarial error" as used as a term of art.

GRANTED. An order consistent with the memorandum opinion shall be entered this day.

DATED: This 18th day of April, 1986.

/s/ JAMES C. TURK
Chief U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 86-3858

B. E. TILLEY; DAVID H. WALL; WILLIAM L. CROTTS; CHRISLEY H. REED; J. C. WEDDLE; WILLIAM D. GOODE;
Plaintiff-Appellant

v.

THE MEAD CORPORATION;
Defendant-Appellee

JUDGMENT

(Filed April 9, 1987)

APPEAL FROM the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Western District of Virginia, at Roanoke for further proceedings consistent with the opinion filed herewith.

/s/ JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. Tilley, et al,
Plaintiffs-Appellants,

v.

The Mead Corporation,
Defendant-Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

(Filed February 17, 1988)

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Widener and Judge Simons, United States District Judge sitting by designation.

For the Court

/s/ JOHN M. GREACEN
CLERK

APPENDIX D

ERISA Section 4044 (1974). Allocation of Assets

(a) In the case of the termination of a defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity —

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth —

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022(b)(5)), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(6) did not apply.

For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * *

(d)(1) Any residual assets of a plan may be distributed to the employer if —

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) The distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

APPENDIX E

THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

* * *

ARTICLE V

AMOUNT OF RETIREMENT INCOME; EMPLOYEE CONTRIBUTIONS

Section 1. Amount of Retirement Income.

A Participant who retires at or after his normal retirement date shall be entitled to a retirement income for life payable monthly equal to the greater of the amounts specified in Paragraphs (a) or (b) for all years prior to January 1, 1976, plus the amount specified in Paragraph (c) for all years after December 31, 1975, as follows:

(a) An annual amount equal to (i) for years prior to January 1, 1968, for each year of Credited Past Service an amount equal to .75% of the first \$6,600.00 of Earnings plus an amount equal to 1.25% of Earnings in excess of \$6,600.00 plus (ii) for each year of Credited Service subsequent to December 31, 1967, but prior to January 1, 1976, an amount equal to 1% of the first \$6,600.00 of Earnings and an amount equal to 1.5% of Earnings in excess of \$6,600.00; or

(b) An annual amount equal to the greater of (i) \$60.00 multiplied by years of Credited Past Service up to a maximum of thirty-five (35) years with proportionate allowance for completed months or (ii) an annual amount which, including the Primary Social Security Benefits provided under Section 1(d) of this Article, is equal to 1.25% of Final Average Earnings as defined in Section 12(a) of Article I, as of January 1, 1976 multiplied by years of Credited Past Service, with proportionate allowance for completed months, up to a maximum of thirty-five (35) years.

(c) For years after December 31, 1975, an annual amount equal to 1¼% of total annual Earnings subsequent to December 31, 1975.

(d) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to one and forty-three/one hundredths percent (1.43%) times years of Credited Past Service with proportionate allowance for completed months, up to a maximum of thirty (30) years by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at the date of his retirement or termination of employment.

Section 2. Early Retirement Income.

(a) A Participant who elects an Early Retirement Date shall be entitled to a retirement income for life, payable monthly, in an annual amount which is equal to the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date reduced by one-twelfth (1/12) of five percent (5%) for each month by which his Early Retirement Date precedes the first day of the month coincident with or next following the date on which he attains age sixty-five (65).

(b) If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits.

Section 3. Minimum Retirement Income.

(a) The minumum monthly retirement income payable to a Participant (in cases of normal retirement, early retirement or late retirement) shall be the greater

of (1) an annual amount which, including a percentage of the Primary Social Security Benefit applicable to him as defined in paragraph (b) of this Section, shall be equal to (A) 1½% of his Final Average Earnings, as defined in Section 12(b) of Article I, multiplied by the number of years of his Past Service with proportionate allowance for completed months, plus (B) 1½% of his Final Average Earnings, as defined in Section 12(b) of Article I, multiplied by the number of years of his Future Service with proportionate allowance for completed months or (ii) an amount equal to twenty dollars ($20.00) per month plus an additional four dollars ($4.00) per month for each full year of Credited Service in excess of five (5) full years of Credited Service.

(b) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to a fraction the numerator of which is the total years of Credited Service of a Participant at his retirement with proportionate allowance for completed months or termination of service and the denominator of which is the greater of (A) thirty (30) years or (B) potential years of Credited Service at Normal Retirement Age with proportionate allowance for completed months times (ii) fifty percent (50%) of the Primary Social Security Benefit to which the employee would be entitled on his Normal Retirement Date, unless the employee has thirty (30) or more Years of Credited Service * * *

* * *

(iv) Fourth — To all other nonforfeitable benefits under the Plan.

(v) Fifth — To all other benefits under the Plan.

(d) For the purposes of Article XIII, Section 4(c):

(i) The amount allocated under any paragraph with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph.

(ii) If the assets available for allocation under any paragraph of Article XIII, Section 4(c) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated prorata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(e) If the Plan is discontinued but the Corporate Benefits Committee further determines that the trust agreement shall be continued pursuant to its terms and the provisions of this Section, no further contributions will thereafter be made by either the Participants or the Employing Companies, but the trust agreement shall be administered otherwise as though the Plan were in full force and effect, except that no further benefits will accrue after the date of discontinu. nce. If the trust agreement is subsequently terminated, the trust assets shall then be allocated and distributed in accordance with the procedure set forth in Subsection (c) above.

(f) Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

(g) If this Plan is terminated as to some (but not all) Participants, then the Corporation shall cause the part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the Actuary) to such Participants and their beneficiaries to be segregated, and the assets so segregated shall be applied for such Participants * * *

APPENDIX F

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-8123

GEORGE H. BLESSITT and WILLIE NEAL, JR.,
Plaintiffs-Appellants,

v.

RETIREMENT PLAN FOR EMPLOYEES OF DIXIE ENGINE COMPANY, J. P. JUNG, AND DIXIE ENGINE COMPANY,
Defendants-Appellees.

En Banc Brief of **Amicus Curiae**
National Employee Benefits Institute,
in Support of Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Georgia

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NO PREFERENCE

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* * *

IV. STATEMENT OF JURISDICTION

Jurisdiction of the court in this action is predicated on 29 U.S.C. § 1132(a).

V. ARGUMENT AND CITATION OF AUTHORITIES

This Court's initial opinion cited two supports for its conclusion—the decision in *Amato* v. *Western Union Int'l, Inc.*, 733 F.2d 1402 (2nd Cir.), *cert. denied*, 106 S.Ct. 1167 (1986), and the Court's strained interpretation of a Pension Benefit Guaranty Corporation ("PBGC") lump sum valuation regulation.

The PBGC, the quasi-federal agency insuring pension benefits, has already stated in its brief requesting rehearing that the Court misinterpreted the lump sum regulation. PBGC Brief in Support of Petition for Rehearing at 11-13. We adopt the PBGC arguments in their entirety. Since the PBGC did not fully address the *Amato* decision, however, the *Amato* case requires extensive discussion. Before turning to the particular issues raised by *Amato*, some background may be helpful with respect to the operation and terminology of pension plans.

A. Background.

1. *ERISA.* In 1974, Congress enacted the Employee Retirement Income Security Act, known as "ERISA", which represented a very large addition to the Internal Revenue Code ("IRC") rules for pension plans. ERISA contains four titles. Titles I and II are in many respects identical, placing the same provisions into the Labor title of the U.S. Code as well as into the Internal Revenue Code. Included in these overlapping provisions were requirements for plan participation, vesting in benefits, accruals of benefits, and funding for pension plans. After ERISA's enactment, the Department of Treasury (through the IRS) and the Department of Labor divided between them responsibility for these overlapping provisions.

Title I also contains provisions that appear exclusively in

the Labor title. These included provisions for plan reports to be filed with the government; for disclosure of plan information to plan participants; and extensive fiduciary rules governing the conduct of ERISA plan fiduciaries. Title III is a general administrative title. Title IV is a new concept: it provided for a system of insurance for private pension plans and created a new agency, the PBGC, to administer the insurance. The PBGC is an independent, nonprofit corporation within the Department of Labor. The PBGC acts as a government insurance company, administering a pension insurance program funded largely by annual premiums paid by all the plans covered by the program, equal to a per-participant dollar amount. ERISA § 4006, 29 U.S.C. § 1306.

2. *Accruals, Vesting, Funding and Insurance.* An understanding of benefit accruals, vesting of benefits, funding and insurance is essential to an understanding of the erroneous basis on which this Court's earlier decision rests.

Accruals: Accruals of benefits under a pension plan are generated according to the pension benefit chosen by the employer and formula provided under the plan. ERISA does not require any particular formula, but limits the way any particular formula may operate. I.R.C. § 411(b), 26 U.S.C. § 411(b); ERISA § 204, 29 U.S.C. § 1054. For example, a formula might provide an employee an annual pension equal to the product of $1,000 multiplied by such employee's years of service. Under this formula, an employee with three years of service would have accrued an annual pension of $3,000. The $3,000 annual pension is called his "*accrued benefit*". I.R.C. § 411(a)(7), 26 U.S.C. § 411(a)(7); Treas. Reg. § 1.411(a)-7(a).

Vesting: An employee who has accrued a benefit may not be immediately entitled to receive the benefit or may not be entitled to receive all the benefit. Whether an employee is entitled to his accrued benefit is determined under ERISA's vesting rules found in I.R.C. § 411(a), 26 U.S.C. § 411(a) and ERISA § 203, 29 U.S.C. § 1053. In some plans employees are immediately fully vested (*i.e.*, they vest in their benefits as such benefits are accrued). In other plans employees earn

vesting rights through years of service with their employers or upon the occurrence of particular events such as attainment of age 65, layoff as a result of a plant closing, or termination of a plan.

Vesting rights earned through years of service with the employer can be on a "cliff" or a graduated basis. For example, in a 5-year cliff vesting plan, an employee would be 0% vested in accrued benefits during his first four years of service and would become 100% vested in accrued benefits after completing five years. In contrast, a graduated schedule could provide that employees vest at the rate of 20% of all accrued benefits for each year of service. After one year he would be 20% vested and after 5 years 100% vested. *See* I.R.C. § 411(a)(2), 26 U.S.C. § 411(a)(2); ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2).

When an employee retires, his pension rights are derived by multiplying his accrued benefit by his vesting percentage. An employee who is 100% vested is paid a pension equal to his entire accrued benefit. An employee who is 80% vested would receive a pension equal to 80% of his accrued benefit, and would forfeit the remaining 20% of his accrued benefit. For example, if at retirement an employee has accrued a pension of $10,000 and is 80% vested he would receive a pension of $8,000 a year. This is so because even though the accrued benefit is $10,000 per year, the vested accrued benefit is $8,000; $2,000 is forfeited.

Funding: Pension plan funding is subject to a separate set of rules which set certain minimums and maximums for employer contributions. *See* I.R.C. § 412, 26 U.S.C. § 412; ERISA §§ 301 et seq., 29 U.S.C. §§ 1081 et seq. The amount an employer may contribute to fund a pension plan any year may vary under these rules. This is because pension funding is an inexact science requiring predictions regarding mortality rates, interest rates, employee turnover, length of employee service, the age at which employees retire, and changes in the size of the employee population.

While a plan's pension formula is one of the factors taken into account under the funding rules, because of the inexact

nature of pension funding there is no necessary correlation between the amount of benefits accrued under a plan at any time and the amount of funds in the plan at such time.

In conclusion, accrued benefits, vested benefits and plan funds increase or decrease at different rates. Because vested benefits are a percentage of accrued benefits, they will always be equal to or less than the amount of accrued benefits. Plan funds, however, might be greater than, equal to or less than the sum of accrued benefits.

Insurance: Defined benefit plans, like the one in the instant case, are covered by Title IV's PBGC pension insurance program. While, as a general rule, the benefits insured by the PBGC are based on the benefits provided under a plan, such insurance is subject to certain limitations. The primary limitations are: (1) a maximum amount per participant; (2) only benefits vested prior to the termination of the plan; (3) a 5-year phase-in of the protection for newly created pension benefits.

The PBGC insurance system is designed to guarantee benefits provided under a pension plan rather than to guarantee a minimum pension. The PBGC guaranteed benefits therefore will never be greater than the amount of accrued benefits under a plan. In most cases the level of guaranteed benefits will be less than the amount of accrued benefits because of the limits on guaranteed benefits. In addition, guaranteed benefits can never exceed vested benefits.

3. *Pension Plan Terminations.* The consequences of a plan termination, which are prerequisite for PBGC approval, are: (1) First, all accrued benefits under the plan become fully vested regardless of the plan's vesting schedule. (2) Next, plan funds are allocated to provide for plan benefits in accordance with the allocation priorities of ERISA § 4044(a). (3) Then, plan benefits are paid out to participants, usually in the form of either a lump sum in cash, representing the commuted value of a benefit, or an annuity certificate purchased from an insurance company which provides for the participant's pension benefits. (4) If plan funds remain at this point, they may revert to the employer. (5) If the amount of plan

funds is smaller than the amount of guaranteed benefits, the PBGC makes up the difference. Otherwise, the PBGC pays out no money on account of a plan termination.

4. *Section 4044 Allocation.* The controversy in the instant case concerns the allocation of benefits under the six categories of ERISA section 4044 (step 2 above). Plaintiffs erroneously assert that those six categories cover more benefits than were either provided for by defendants or required by the PBGC or the IRS (thus reducing any possible employer reversion under step 4).

The six allocation categories under section 4044 are: employee contributions (1) and (2); benefits guaranteed by the PBGC (3) and (4); all other nonforfeitable benefits under the plan (5); and all other benefits under the plan (6). "Nonforfeitable" under Category 5 refers to benefits that were nonforfeitable (vested) prior to the plan termnation. ERISA § 4022(a), 29 U.S.C. § 1322(a); 29 C.F.R. § 2613.6(b).

5. *The Issue: Coverage of Category 6.* The issue before the Court is the proper interpretation of Category 6. Defendants contend that Category 6 includes only *accrued* benefits not covered by the prior five categories. The Court in its initial opinion held that Category 6 is not limited to *accrued* benefits but also includes participants' benefit expectations. * * *

APPENDIX C

INTERNAL REVENUE SERVICE
District Director

Department of the Treasury
P.O. Box 2508, Cincinnati, OH 45201

Person to Contact: Jim Sandy
Telephone Number: 513-684-3947
Refer Reply to: EP/EO
Date: April 29, 1986

File Folder Number: 310002047
Re: The Mead Industrial Products Salaried Retirement Plan

(Received March 31, 1988)

The Mead Corporation
Mead World Headquarters
Courthouse Plaza N.E.
Dayton, Ohio 45463

Dear Sir or Madam:

We have considered the information you sent us and have determined that your termination of this plan does not adversely affect its qualification for Federal tax purposes. Please note that this is not a determination regarding the effect of other Federal or local statutes.

Even though you have terminated this plan, we would like to remind you of certain filing obligations. The related tax-exempt trust, custodial account, or other payers who are responsible for making payments may be required to file information returns on Forms W-2P or 1099R, with Forms W-3 or 1096, respectively, for amounts paid or made available to any individual or beneficiary.

In addition, you must continue to file a Form 5500 series

return annually until all plan assets are distributed. The last return required is the one filed for the year in which distribution is completed. Be sure to write "Final Return" across the top of this return.

Your plan's qualified status will be adversely affected if plan assets are returned to you before the plan's liabilities to all plan participants are satisfied by the purchase of guaranteed annuity contracts or the making of lump sum distributions. When you receive these excess plan assets, you should notify the Service of the date(s) you receive such assets and the date(s) guaranteed annuity contracts were purchased, or the date(s) of the payment of lump sum distributions for all participants.

Proposed date of termination is August 1, 1983.

This determination includes consideration of the response to our request for technical advice. Attached is a copy of this response.

This determination letter does not apply to any provisions of the Tax Equity and Fiscal Responsibility Act of 1982.

You should keep this letter in your permanent records.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ JAMES J. RYAN
District Director

APPENDIX H

[LETTERHEAD OF
PENSION BENEFIT GUARANTY CORPORATION]

(November 29, 1983)

In reply refer to: 110-50962
Name of Plan: Mead Industrial Products Salaried
Retirement Plan

R. E. Emrick
Mead Corporation
World Headquarters
Courthouse Plaza Northeast
Dayton, Ohio 45463

Dear Mr. Emrick:

The Pension Benefit Guaranty Corporation (PBGC) received the information required to demonstrate sufficiency relating to the termination of the above-identified Plan. Based on this, the Corporation is issuing the enclosed Notice of Sufficiency in accordance with Section 4041(b) of the Employee Retirement Income Security Act of 1974 (ERISA).

Upon receipt of the Notice of Sufficiency, you have 90 days to complete the termination of the Plan in accordance with Subtitle C, Title IV of ERISA.

Please note that in order to remove your plan from the PBGC-1 Form and premium billing mailing list, Subpart C of 29 CFR Part 2615, requires you to submit to PBGC within 60 days after the completion of the distribution of plan assets, a certified statement that the plan assets were allocated in accordance with Section 4044 of ERISA, and also include the following information:

(1) For each participant or beneficiary to whom distribution was made —

(a) Name,
(b) Address,
(c) Telephone number,

(d) Sex,
(e) Date of birth,
(f) Social security number,
(g) The amount of benefit provided and unless previously submitted, the basis for computing the amount,
(h) The cost of providing the benefit, and
(i) The form in which the benefit was provided.

(2) If annuity contracts were purchased from an insurer, the name of the insurer and the policy number(s); and

(3) The place or places where plan records will be held.

Please note the enclosed booklet regarding establishment of IRAs.

Sincerely,

/s/ LANCE L. LEN
Case Officer, CPD 2/3
Division of Case Processing
(202) 254-7873

Enclosure

[LETTERHEAD OF
PENSION BENEFIT GUARANTY CORPORATION]

Date: November 29, 1983

NOTICE OF SUFFICIENCY

Name of Plan: Mead Industrial Products Salaried Retirement Plan

Date of Termination: August 1, 1983

Proposed Date of Distribution: December 31, 1983

Based on the information you supplied us, we hereby find that the assets of this Plan will be sufficient as of your proposed date of distribution to discharge when due all obligations of the Plan with respect to guaranteed benefits.

This finding is made under the Employee Retirement Income Security Act of 1974, Section 4041(b), 29 USC 1341(b).

/s/ LANCE L. LEN
Case Officer
Case Processing Division, 2/3
(202) 254-7873

APPENDIX I

[LETTERHEAD OF
PENSION BENEFIT GUARANTY CORPORATION]

FEDERAL EXPRESS

FOIA 88-231 April 27, 1988

Smith & Schnacke
Attn: Judith Boyers Gee
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202-3163

Re: Reversion Information

Dear Ms. Gee:

This is in response to your Freedom of Information Act request for a dump of information pertaining to terminated plans involving reversion of assets of over $1 million dollars. Pursuant to your request, and my follow-up letter of April 20, 1988, we have altered our existing program which generates this list to include the EIN/PN for each of the plans on the list. As indicated in our follow-up phone conversation of April 26, 1988, the enclosed list reflects plans that terminated with reversions of over $1 million between January 1980 and mid-January 1986. The plans from mid-January 1986 to January 1988 are maintained on a separate data base that does not have EIN/PN information included and therefore we were unable to make a dump with EIN/PN's.

Substantial time was devoted to the production of the enclosed printout and since the altered data was not needed by the Pension Benefit Guaranty Corproation, the cost of production is being passed on to you as requester. Specifically, six hours of technical and programming time was incurred at a cost of $261.18. In addition, a $50 machine run time charge is applicable along with a one hour ($16.00) review charge. The total bill for production for the printout is $327.18.

If I can be of any further assistance, you can contact me at

(202) 778-8839. A statement of Charges listing the charges referenced above is enclosed. Please return a copy of the statement with your payment.

Sincerely,

/s/ E. WILLIAM FITZGERALD
Disclosure Officer

cc: Jeanne K. Beck

APPENDIX J

ARTICLE FROM MIAMI REVIEW

BIG SUIT TARGETS PENSIONS TROVE

Florida class action threatens corporate handling of workers' benefits nationwide

By Laurel Leff
REVIEW STAFF WRITER

In the past five years, hundreds of major U.S. corporations, including several in South Florida, have terminated their employees' defined benefit plans and raised a total of $15.88 billion in capital from the excess funds in those plans.

But a class action suit filed Tuesday in federal court in Miami against United States Sugar Corp. of Clewiston promises to be the first of what could be an avalanche of suits. At stake, potentially, is a significant portion of the nearly $16 billion reverted to corporations rather than paid to 1.6 million workers who participated in terminated plans.

"This could be awesome," said Alan J. Kluger, a Miami litigator who filed the suit on behalf of a former U.S. Sugar employee and about 2,500 other current and former employees of the big Hendry County sugar producer. "The potential exposure to corporate America is huge. They've taken money otherwise belonging to employees and have used it to build corporate America for the last five years."

"I think it's a very serious problem," said Michael Canan, who does employee benefit work for many corporations as an attorney of-counsel with Steel Hector & Davis in Miami.

The suit charges that U.S. Sugar improperly calculated the benefits that mechanic Greg Franklin and other employees received when the company terminated its defined benefit plan in 1986. The company, whose plan was overfunded, paid a certain amount to employees in the form of annuities and kept the remainder, about $20 million.

But the suit claims the employees were shortchanged.

Those who participated in the plan — which was designed to guarantee them continuing payments of a certain percentage of their salaries upon retirement — were provided with an annuity equal to the benefits that they had so far accrued. Under the Employee Retirement Income Security Act of 1974 (ERISA), however, plan participants should have received annuities equal to their projected, not accrued benefits, the suit maintains.

Donald J. Jaret, a pension law expert who is bringing the suit along with Kluger, said he can't yet tell how much of the $20 million that reverted to U.S. Sugar actually belongs to employees. That will depend on a variety of actuarial calculations, particularly the age of U.S. Sugar's work force, he says.

"I'd be very surprised if 100 percent of it didn't belong to plan participants," Jaret added.

Sharon Dixon, a Mershon, Sawyer, Johnston, Dunwody & Cole associate who handles some of U.S. Sugar's employee benefit work, declined to comment on the suit, saying the company had not yet been served and she had not yet seen the suit. At U.S. Sugar, company officials could not be reached for comment.

Kluger and Jaret said they expect to file many similar suits. They are already preparing a suit for a Fort Lauderdale employee of American Express Co., which claimed $90 million upon termination of its defined benefit plan in 1985.

The attorneys also are negotiating a settlement for a small group of middle managers at a Miami financial institution, which Kluger declined to name. Kluger said the institution was eager to talk to them when it learned some managers had approached the attorneys about suing. "It's a lot cheaper to make peace with five or six people than with 2,500," he said.

Kluger's co-counsel, Jaret, said: "We anticipate that these type of matters will become very major aspects of both of our firms."

Canan of Steel Hector also expects many more suits by aggrieved employees. "I'm sure of it," he said.

What prompted the suit is a June 1987 decision of the U.S. Court of Appeals for the 11th Circuit, *Blessitt* v. *Retirement*

Plan for Employees of Dixie Engine Co. Corporate pension lawyers refer to it derisively as "that blessed decision."

In *Blessitt*, a three-member panel concluded, in a unanimous opinion written by visiting Senior 8th Circuit Judge J. Smith Henley, that Congress had intended that "employees should be paid benefits promised under the plan but not yet accrued before the employer receives the residual assets in the fund."

The *Blessitt* decision "goes against the conventional wisdom," said Steel Hector employee benefit lawyer Canan. "It's different from the way everyone's done thing in the past."

Prior to *Blessitt*, and a few decisions that anticipated it, employee benefit attorneys regularly advised their corporate clients to terminate defined benefit plans and revert the excess assets to corporate purposes.

Many defined benefit plans had become grossly overfunded in the 1980s. Required contributions to the plans were frequently calculated assuming that the plans would earn only a 6 percent interest rate. Interest rates were actually in double digits. The plans also assumed that employer contributions would have to cover salary increase of 7 percent a year. But a lower inflation rate meant that companies wouldn't have to pay out so much in salary hikes.

At the same time, many large corporations were anxious for capital. Faced with dropping oil prices, several oil companies eliminated their defined benefit plans and soaked up the cash. Exxon Corp., for example, took a $1.6 billion reversion in 1986.

Pressed by regulators to increase their capital, many financial institutions also identified the defined benefit plan's excess funds as a source of ready cash.

In 1985 and 1986 alone, U.S. corporations raised almost $10 billion in capital by terminating their defined benefit plans, according to the Pension Benefit Guaranty Corp., a federal agency that distributes the assets of terminated pension funds.

"Most experts considered what employers did entirely cor-

rect," said Jaret, the attorney for the plaintiff in the U.S. Sugar case. "There was no bad faith; nobody neglected the law intentionally."

And then a 1985 opinion of the U.S. Court of Appeals for the 2nd Circuit implied that all those experts could be reading the statute incorrectly. In *Amato* v. *Western Union International Inc.*, the 2nd Circuit disagreed with a lower court's determination that ERISA did not entitle the participants in a discontinued plan to any unaccrued benefits they had under the plan. "This holding is not supported by the statutory language of ERISA, Section 404(a), the regulations construing it, or its legislative history."

The court found that Congress "decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the plan's full benefit structure."

Because the case didn't turn on this issue, the 2nd Circuit's finding was only *dicta*, lacking precedential value. An April 1987 opinion of the 4th Circuit cited the case approvingly. But it wasn't until *Blessitt* that the finding became law in any of the country's 12 federal circuits.

George Blessitt, an employee of Dixie Engine whose retirement plan was terminated, sued the Atlanta company because his benefit check was $592.85 low. Blessitt claimed that Dixie had miscalculated his benefits, as well as those of other plan participants, and owed them a total of $225,000.

Citing ERISA, the 11th Circuit said Dixie Engine was entitled to "residual assets" as long as "all liabilities of the plan to participants and their beneficiaries have been satisfied." The question was what constituted a liability.

ERISA outlines, in order of priority, six categories of benefits that must be paid upon termination of a plan. The 11th Circuit concluded that the sixth priority category, a catchall that refers to "all other benefits under the plan," covers unaccrued forfeitable benefits promised under the plans, such as those promised to Dixie Engine employees — and similar to the ones promised U.S. Sugar employees, according to Franklin's suit.

Stanley Kuperstein, a Miami tax attorney who does a significant amount of ERISA work, said that when he first learned of the decision he thought it was "unbelievable."

"I made somebody send me the case because I didn't believe it," he said.

Kuperstein continues to think the case was wrongly decided. "It reads something into the statute that isn't there," he said. "We have enough problems interpreting the statute as it is, without adding to it."

Robert Friedman, an attorney in Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel's tax department, said he also thinks *Blessitt* is "absolutely wrong."

"I don't see how employees who participate in a plan can expect to get benefits that have not been accrued but would have been accrued had the plan not been terminated," Friedman said. "It doesn't make sense."

But Steel Hector lawyer Canan said he can see how nonexperts could read the statute and come to the same conclusion as the 11th Circuit did. "The statute may be overly broadly written," he conceded.

Andrew P. Gold, an associate with Kluger's firm of Kluger, Peretz & Kaplan, who is working on the case, said he isn't surprised other pension lawyers think *Blessitt* is flawed. "They're not about to turn around and say, 'I know we told you to take the $90 million which you've now spent, but sorry, you have to put it back,' " said Gold.

"They're just holding their breath and hoping the case will go away," said Kluger and Gold's co-counsel Jaret.

That's not likely — at least in the near future.

Immediately after the decision was issued in June, the Internal Revenue Service suspended approving any corporate tax deductions for defined benefit plans in the 11th Circuit until it had studied the opinion. The IRS eventually concluded the opinion was incorrect and resumed approval of the plans.

Tax attorney Kuperstein said the IRS opinion is important. "It's extremely unusual for the IRS to take a position contrary to the way a court interprets a statute, especially if it's not against the IRS," he said.

Kuperstein said he's had clients who have terminated a defined benefit plan, even after *Blessitt*. He said he advises them of the risks, but isn't too concerned. "The IRS is a powerful ally," he said.

Canan is more cautious. "It's a risk, there's no question that it's a concern," he said.

Douglas Henderson, regional vice president of Herget & Co., an employee benefit consultant in Fort Lauderdale, said he is concerned that "some plans may not be overfunded because money won't be available to companies anymore." *Blessitt* is likely to be appealed.

"Those lawyers who assume the Supreme Court won't consider *Blessitt* seriously may not be right," he said.

APPENDIX K

EXCERPT FROM BNA PENSION REPORTER

Opinion No. 87-11
§ 4044(a)
§ 4044(a)(6)
§ 4044(d)
§ 4044(d)(1)

Oct. 22, 1987

This is in response to your request for an opinion concerning the benefits to which the plan administrator of a terminated single-employer defined benefit pension plan must allocate assets under Section 4044(a) of ERISA before any residual assets may be distributed to the employer pursuant to Section 4044(d). You specifically asked whether Section 4044(a)(6) requires the payment of any benefits that participants have not accrued by the date of plan termination, but to which they might have become entitled in the future if the plan had not terminated and they had continued working in covered service.

The facts, as we understand from your request, are as follows. ________ is terminating two defined benefit pension plans, the Retirement Benefit Plan for Salaried Employees of Incorporated and the ________ Incorporated Retirement Income Plan for Hourly-Rate Employees (collectively, the "Plans"). The respective dates of termination are April 30, 1987, and June 30, 1987. The plan administrator proposes to annuitize benefits under the Plans by purchasing group annuity contracts from an insurance company in consideration of the payment of a one-time premium for each contract. All benefits accrued under the Plans as of their respective dates of termination will be guaranteed under the annuity contracts as the unconditional, irrevocable and noncancellable obligation of the insurance company from which the contracts will be purchased. The annuity contracts will provide for all optional

forms of benefit payments available under the Plans, as well as early retirement benefits, other benefits protected from cutback by Section 301(a) of the Retirement Equity Act of 1984, and preretirement survivor annuities. Early retirement benefits in amount based on the participants' accrued benefits as of the date of plan termination will be provided under the annuity contracts to participants who then meet the age and service requirements for the subsidy or who will meet those requirements in the future. If the insurance company fails to pay benefits at the time or in the manner set forth in the Plans and the annuity contracts, effected participants will have a cause of action against the insurance company to enforce the payment of benefits.

Section 4044(a) of ERISA governs the allocation of plan assets to plan benefits in the case of the termination of a single-employer pension plan. Plan assets must be allocated in succession to the benefits described in each of the six priority categories established in Sections 4044(a)(1) through (a)(6). Section 4044(d)(1) of ERISA provides that any residual assets remaining after satisfaction of all benefits in priority categories 1 through 6 of Section 4044(a) may be distributed to the employer if all liabilities of the plan to participants and their beneficiaries have been satisfied, the distribution does not contravene any provision of law, and the plan provides for such a distribution in these circumstances. Each of the Plans you submitted with your request satisfies the second and third of these conditions.

After assets have been allocated to the benefits assigned to priority categories 1 through 5 of Section 4044(a), Section 4044(a)(6) requires that the remaining assets be allocated to the payment of "all other benefits under the plan." Under the PBGC's regulation on the Allocation of Assets to Benefit Categories (29 C.F.R. Part 2618, Subpart B), "the benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable." 29 C.F.R. § 2618.16. As the PBGC explained in the preamble to the proposed form of the regulation, "priority category 6 will contain the value

of accrued forfeitable benefits of a participant." 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975). The PBGC accordingly construes Section 4044(a)(6) to include only accrued benefits, or, in the case of subsidies protected by the Retirement Equity Act, benefits to which participants may become entitled in the future.[1] *See, e.g.*, Opinion Letters 86-1 (Jan. 15, 1986) [13 *BPR* 485], 85-28 (Dec. 3, 1985) [13 *BPR* 410], 85-9 (April 5, 1985).

Section 4044(a) does not create benefit entitlements not otherwise provided for elsewhere in ERISA or under the plan. ERISA does not require benefit accruals per se based on service not actually completed under a plan. Moreover, the Plans that are the subject of your request for an opinion do not provide for the present award of benefit accrual credit based on hours of service not yet completed, nor for the payment, either before or after plan termination, of "unaccrued benefits" based on such unearned service. Section 4044(a)(6) accordingly does not require the allocation of assets to pay benefits that might have accrued in the future if the Plans had not terminated and the participants had continued performing covered service. Consequently, such "unaccrued benefits" cannot be considered "liabilities of the plan to participants and their beneficiaries" under Section 4044(d)(1).

You should be aware that panels of the United States Courts of Appeals for the Fourth and Eleventh Circuits, respectively, have decided otherwise in *Tilley* v. *Mead*, 815 F.2d 989 (4th Cir. 1987) [14 *BPR* 1044, 8 *EBC* 2134] and *Blessitt* v. *Dixie Engine Co.*, No. 86-8123 (11th Cir. June 1, 1987) [14 *BPR* 862, 8 *EBC* 1929], although both cases are cur-

---

[1] ERISA, as amended by the Retirement Equity Act, requires the payment of early retirement benefits and retirement-type subsidies "with respect to benefits attributable to service before" plan termination. 29 U.S.C. § 1054(g); *see* 26 U.S.C. § 411(d)(6). In the case of a retirement-type subsidy, ERISA requires such payments of benefits accrued at the date of plan termination to any participant who meets, either before or after plan termination, the pretermination conditions for the subsidy. *Id.* Assets accordingly must be allocated under Section 4044(a) to the payment of these benefits.

rently pending on petitions for rehearing. In each of these cases, the PBGC has filed an *amicus curiae* brief in support of rehearing.

I hope this letter is of assistance. If you have further questions on this matter, please contact Jeanne Beck of my staff at the above address or at (202) 778-8824.

Very truly yours,

GARY M. FORD
General Counsel

[LETTERHEAD OF PENSION BENEFIT GUARANTY CORPORATION]

29 CFR 2617
29 CFR 2619

January 15, 1986

This is in response to your inquiries concerning the interpretation of the Pension Benefit Guaranty Corporation's ("PBGC") regulation, 29 C.F.R. § 2619.26, "Lump Sums and Other Alternative Forms of Distribution in Lieu of Annuities." You specifically asked for clarification of subsection b(1) with regard to "the present value of the normal form of benefit provided by the plan payable at normal retirement age."

Under an ongoing pension plan (a plan that has not terminated), active plan participants accrue service credit under the terms of the plan for participation right, benefit level, and vesting purposes. As a participant accrues more years of service, he or she generally accrues higher benefits which will be payable upon retirement. On the date of plan termination, however, all accruals will cease. Benefit entitlements under the terminated plan are calculated with reference *only* to each participant's service accrued up to the date of termination. For example, a participant with 15 years of service and 45 years of age on the date of plan termination will generally be entitled to a benefit calculated with reference to 15 years of service and payable at normal retirement age. The regulations of the PBGC at 29 C.F.R. §2617.4 require that such a benefit be paid in the form of an annuity unless an alternative form (such as a lump sum) is permitted by one of the exceptions in the rule.

Section 2619.26(b)(1) provides:

> The value of the lump sum or other alternative form of distribution payable under this section is the present value of the normal form of benefit provided by the plan

payable at normal retirement age, determined as of the date of distribution using reasonable actuarial assumptions as to interest and mortality.

In order to determine the value of a lump sum or other alternative form of distribution in accordance with this regulation, the plan administrator first must determine the "benefit provided by the plan payable at normal retirement age," *i.e.*, at noted above, the benefit to which a participant is entitled under the terms of the pension plan as of the plan termination date. Second, the plan administrator must calculate the present value of the normal form of such benefit, using reasonable actuarial assumption as to interest and mortality determined as of the date assets of the plan are distributed pursuant to the termination. *See* 29 U.S.C. §§ 1341, 1344; 29 C.F.R. § 2617.21. The "normal form of benefit" is the form in which benefits are payable under the plan (*e.g.*, joint and survivor annuity or lump sum) assuming that participants have not elected payment in different forms. Section 2619.26(c)(2) lists certain interest assumptions that PBGC will consider reasonable for calculating the value of a lump sum or other alternative form of distribution.

I hope this letter is of assistance. If you have further questions on this matter, please contact Valerie Dinkins of my staff at the above address or at (202) 956-5024.

Very truly yours,

EDWARD R. MACKIEWICZ
General Counsel

OPPOSITION BRIEF

(5)

No. 87-1868

In The

Supreme Court of the United States

October Term, 1987

THE MEAD CORPORATION,

Petitioner,

v.

B. E. TILLEY, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

QUESTIONS PRESENTED

I. Whether contingent early retirement benefits are a "benefit under the plan" under 29 U.S.C. §1344(a)(6).

II. Whether contingent early retirement benefits are a contingent liability under 29 U.S.C. §1344(d)(1)(a).

III. Whether the funds Mead recouped were funds in excess of actuarial error.

IV. Whether Mead violated fiduciary duties in including funds set aside for contingent benefits in its asset reversion.

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No. 87-1868

In The

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October Term, 1987

THE MEAD CORPORATION,

Petitioner,

v.

B. E. TILLEY, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents, B. E. Tilley, et al, respectfully oppose the Petition of The Mead Corporation for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

STATUTE INVOLVED

This cause centers around the interpretation of the Employee Retirement Income Security Act of 1974, hereinafter referred to as "ERISA," 29 U.S.C. §1344.

STATEMENT OF THE CASE

This case is an action by six former employees, hereinafter referred to as "employees," of The Mead Corporation to recover pension plan funds wrongfully withheld from them when the plan was terminated.

The Mead Corporation, hereinafter referred to as "Mead," acquired the Lynchburg Foundry Company in 1968. Subsequently, the Mead Industrial Products Salaried Retirement Plan, hereinafter referred to as "the pension plan," was formed. The pension plan was a defined benefit plan. Under a defined benefit plan, funds are set aside in a trust account during an employee's tenure to satisfy the plan's liabilities. At the time of distribution, the employee is entitled to a benefit which is defined by the plan as opposed to a share of the trust fund. When Mead sold the Foundry in 1983, the pension plan was terminated. Mead kept over $10,000,000 of the trust fund assets it claimed to be in excess of the plan's liabilities.

The normal retirement age under the pension plan was 65. However, employees with 30 years or more credited services at the Foundry could retire with full benefits at age 62. Five of the six employees in this lawsuit, B. E. Tilley, David H. Wall,[1] Chrisley H. Reed, J. C. Weddle and William D. Goode, were definitely entitled to retire at age 62, all of whom had 30 years credited service at the

[1] David H. Wall died recently, after the initiation of this action.

termination of the pension plan. William L. Crotts would have had 30 years of credited service by the time he was age 64. *See*, Table 1.

The pension plan was formally terminated on August 1, 1983. Although the pension plan gave employees with 30 years of credited service the right to retire at age 62, all of the employees' benefits were figured on a retirement age of 65, the effect of which was to significantly reduce the employees' lump-sum benefit. *See*, Table 1.

TABLE 1

Employees' Damages for Improper Actuarial Reduction

EMPLOYEE	AGE	CREDITED SERVICE	EARLY* RETIREMENT AGE	BENEFIT PAID	EARLY** RETIREMENT AGE BENEFIT	DIFFERENCE***
B. E. Tilley	57.500	35.0833	62.0000	$87,108.74	$100,175.05	$13,066.31
D. H. Wall	57.0833	32.4167	62.0000	65,360.80	75,164.92	9,804.12
W. L. Crotts	61.4167	27.0833	64.3333	87,552.03	90,467.51	2,915.48
C. H. Reed	58.3333	30.8333	62.0000	69,882.45	80,364.81	10,482.37
J. C. Weddle	57.4167	36.0833	62.0000	50,800.35	58,420.40	7,620.05
W. D. Goode	59.0833	30.4167	62.0000	83,923.93	96,512.52	12,588.59
TOTAL DAMAGES						$56,476.92

*The Early Retirement Age is the earliest age at which the employee could have retired with full benefits.

**The Early Retirement Age Benefit is determined by figuring the actuarial reduction of 5% per year from the Early Retirement Age instead of the age of 65. In most cases this would be obtained by multiplying the benefit paid by the number 1.15. To calculate Mr. Crott's Early Retirement Age Benefit, one would use only 0.6667 of a year (65 - 64.333 = 0.6667) and hence the number of 1.0333 should be used.

***The Difference is the difference between the Benefit Paid and the Early Retirement Age Benefit.

SUMMARY OF ARGUMENT

The crux of this case is simple. The employees were promised a subsidized early retirement benefit. Funds were set aside in the pension plan trust fund to pay for these benefits. Five of the six employees had over 30 years of credited service *and were within a few years of enjoying the subsidized benefit when Mead unilaterally terminated the plan. Mead further unilaterally declared that their contingent subsidized benefit was worth nothing and recouped all of the funds in the trust fund set aside to pay for that benefit. Never before in the history of English common law has a trustee been able to so openly profit by its own unilateral act. The funds which Mead recouped which were set aside to pay this contingent early retirement benefit are funds which Mead would have had to pay had the pension plan continued. The instant case is an attempt by the employees to recover their share of those funds which were set aside in the trust fund to pay for their early retirement benefit.

The respondents are employees of Mead and participants in Mead's pension plan. Under the plan, the normal retirement age was 65, but participants with 30 years of service and age 62 could retire with full benefits. This benefit was a funded part of the pension plan, with Mead contributing funds to the pension plan on an actuarially reduced basis with the assumption that many employees would retire at age 62. In 1983, Mead terminated the pension plan and paid early retirement benefits only to those employees who met both the age and years of service criteria. Mead calculated all other employee benefits as if they would have retired at age 65. Mead then recouped over $10,000,000 from the fund. The employees

argue that Mead was required to compensate, at an actuarially reduced rate, the employees for the loss of their early retirement benefits.

The key statute to understanding this case is 29 U.S.C. §1344 (1983), which deals with the allocation of assets on the termination of a pension plan. Two parts of §1344 mandate the employees' recovery. First is §1344(a), which sets out six benefit categories which must be paid on termination of a pension plan, which require Mead to pay *all* "benefits under the plan." Early retirement benefits were "benefits under the plan" and therefore Mead must pay them. The second important section is §1344(d), which states when an employer may recoup assets. Under that section an employer may recoup assets only when all liabilities are paid and the plan provides for a recoupment. The contingent early retirement benefits were a liability to the plan. Further, the plan allowed only amounts due to actuarial error to be recovered and Mead has admitted that the questioned amounts in this suit are not due to actuarial error. Mead, therefore, has satisfied neither portion of the test. Section 1344, therefore, requires that Mead compensate the employees for their early retirement benefits, and forbids Mead from recouping any funds until they have done so.

REASONS FOR DENYING THE WRIT

I. A RULING FOR MEAD WOULD BE UNPRECEDENTED BOTH UNDER COMMON LAW AND UNDER ERISA.

A. In A Thousand Years Of English Common Law Trusts, The Contingent Benefit Always Had To Be Satisfied Prior To The Termination Of A Trust Fund--ERISA Does Nothing To Change This.

1. *All Pre-ERISA Decisions Required Funded Contingent Benefits To Be Satisfied Prior To Termination Of A Trust Fund.*

Mead would have this court believe that what the employees ask of this court is shocking and unusual – nothing could be further from the truth. English common law has probably known a thousand years of trust law, and to this author's knowledge, no Appellate Court has ever allowed a trustee to terminate a trust fund without providing for contingent benefits. *See,* Annot. 45 A.L.R. 743, 746 (1926) (listing over 40 cases on the subject from 20 states in the United Kingdom); Annot. 123 A.L.R. 1427, 1436 (1939); Annot. 163 A.L.R. 852, 858 (1946); *see also, Hills v. Travelers Bank & Trust Co.,* 125 Conn. 640, 7 A.2d 652 (1939).

2. *All Post-ERISA Courts Have Ruled For The Employees On The Issue Of Contingent Benefits Upon Termination.*

Not only have the pre-ERISA courts held that the contingent benefits must be satisfied, all post-ERISA Appellate Courts which have reviewed this issue have ruled that contingent benefits must be paid to the extent funds are available. *See, Amato v. Western Union Intern., Inc.,* 773 F.2d 1402 (2nd Cir. 1985), *cert. dismissed,* 474 U.S.

1113 (1986) (contingent early retirement benefits); *Tilley v. The Mead Corporation,* 815 F.2d 989 (4th Cir. 1987) (contingent early retirement benefits). Thus, all courts, both pre-ERISA and post-ERISA, have required the payment of contingent benefits prior to the termination of a trust fund. The bottom line is that Mead would have this court forget everything it ever knew about trusts and approach ERISA as a mystical statute with strange purposes and hidden meanings that only an ERISA alchemist would understand.

The truth of the matter is that ERISA changes common law very little. Reversions to the settlor were possible in common law trusts after *all benefits* were paid. *See,* Annot. 45 A.L.R. 743 (1926). ERISA has the identical language: *"All benefits"* as contained in 29 U.S.C. §1344(a)(6). At common law, all benefits were held to include contingent benefits. *See,* Annot. 45 A.L.R. 743, 746 (1926). The plain meaning of ERISA would have this court hold that all benefits mean the same as however courts have interpreted these words for a thousand years – to include contingent benefits.

B. Mead Asks This Court To Grant It A Windfall So That It May Recoup Funds Set Aside In The Pension Plan For Early Retirement Benefits.

Five of the six employees in this cause worked for over 30 years at the Lynchburg Foundry Company. Mead takes the position that an employee could have been within one day of retiring at the termination of the plan and he would forfeit 100% of his early retirement benefit. Mead's position is entirely inconsistent with the common law of contracts. Had this been an ordinary contract contingency, such as a life insurance policy, Mead would

have had to pay the fair market value of that benefit as of the date of the unilateral termination. For example, if the same employee purchased term-life insurance for a one-year term at a $100 premium and the company terminated his insurance contract in six months, this court would not hesitate to rule that the employee would be entitled to a $50 refund on the unexpired portion of the term. Mead, however, takes the position that once the contract is entered into the contingency must be fully performed. Therefore, if Mead were the insurance company, it would keep the entire premium under the logic that the employee is not yet dead and therefore is not entitled to recover any sums under the insurance contract despite the fact that in the next six months the employee may or may not die.

In *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971), the Fourth Circuit Court of Appeals held that a pension plan is a bargained-for benefit which is earned as deferred compensation just as a salary is earned as immediate compensation and is not a gift on behalf of the employer that is revocable at the employer's whim. *Id.*

ERISA was enacted as a comprehensive statute to protect employee benefits. Mead would stand this court on its head to convince it that the floor was the ceiling and the ceiling the floor and that ERISA was not enacted as a shield to protect employee benefits, but a sword for the employer to be used against the employee. In fact, ERISA does just the opposite. By enacting broad and sweeping fiduciary duties upon the employer, Congress prohibited an employer from maintaining a pension plan for any reason other than the exclusive benefit of the employee. To allow an employer to profit under these

circumstances would be to violate those fiduciary duties. *See*, 29 U.S.C. §1104.

II. A FUNDED EARLY RETIREMENT BENEFIT IS AN ACCRUED BENEFIT UNDER ERISA.

The lynchpin of Mead's argument is that a funded early retirement benefit is an unaccrued benefit in the hopes of wedding the *Tilley, supra*, decision to the far more controversial and infinitely more sweeping *Blessitt* decision. *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (llth Cir. 1987), *reh'g en banc granted*, 836 F.2d 1571 (llth Cir. 1988). In this attempt, Mead seeks to try the case it wishes it had (*Blessitt*), instead of the *Tilley* decision. *Blessitt* deals with totally unfunded benefits and seeks to recover for years the employees have not worked but may possibly work had they been given the chance. On the other hand, the *Tilley* decision deals with a funded early retirement benefit which employees have earned as a result of their service. The problem with Mead's reasoning is that the emerging rule on whether a benefit is accrued or unaccrued at the termination of a plan is whether the benefit is funded at termination. *See, Collins v. Seafarers Pension Trust*, 641 F.Supp. 293, 296 (D.Md. 1986); *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985); *C.f. Sutton v. Weirton Steel Div. of Nat. Steel Corp.*, 724 F.2d 406 (4th Cir. 1983). There is no dispute in this regard that the *Tilley* early retirement benefits were funded and therefore should be treated as accrued. *See, Collins*, 641 F.Supp. at 296.

III. EVEN IF UNACCRUED, TILLEY BENEFITS WERE EARNED BENEFITS AND EMPLOYEES WOULD NEVERTHELESS RECOVER.

A. Contingent Early Retirement Benefits Are A Priority Category 6 Benefit Which Must Be Paid In The Event Of A Termination Of A Fully-Funded Pension Plan.

The key issue for this court to decide is whether a contingent early retirement benefit is a priority category 6 benefit under the termination provisions of ERISA 29 U.S.C. §1344(a).

1. *The Termination Provisions Of ERISA Set Forth Six Priority Categories.*

The Employee Retirement Income Security Act, 29 U.S.C. §§ 1000 *et seq.*, is the comprehensive federal statute which regulates all aspects of pension plan trusts including their termination. The controlling statute in this case is 29 U.S.C. §1344, which provides for the allocation of fund assets on termination:

> §1344. Allocation of Assets
>
> (a) Order of priority of participants and beneficiaries.
>
> In the case of termination of a single employer benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> . . .
>
> (5) Fifth, to *all other nonforfeitable benefits* under the plan.
>
> (6) Sixth, to *all* other benefits under the plan.

(Emphasis added.)

A comparison of the two sections is important to an understanding of the case, as explained below.

2. *The Early Retirement Benefits In This Action Meet The Requirements Of A Priority Category 6 Benefit.*

The language of §1344(a) sets out only two requirements which an item must meet in order to become a priority category 6 benefit: (1) it must be a benefit, and (2) it must be payable under the plan.

(a) *The Early Retirement Benefit Is A Benefit Under 29 U.S.C. §1344.*

The early retirement provision which is the subject of this litigation is contained in Article V, Section 2(b) of the pension plan:

> *Section 2. Early Retirement Income*
>
> (b) If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits.

Clearly, the above provision is a benefit. Unfortunately, "benefit" is not defined by ERISA law. Nevertheless, the meaning of benefit has been clearly established. Black's Law Dictionary defines "benefit" in part as: "Advantage, profit; fruit; privilege; gain; interest." *Black's Law Dictionary* 143 (5th ed. 1979). It is clear that the early retirement section in dispute here was a "privilege" to the "advantage" of the employees.

It is *not* necessary that the employees show that the benefit is nonforfeitable under ERISA. In fact, by definition, a priority category 6 benefit cannot be nonforfeitable, as priority category 5 covers all other nonforfeitable benefits. Any benefit which is nonforfeitable therefore would automatically be covered in priority categories 1 through 5. *See*, 29 U.S.C. §1344; 29 C.F.R. §2618.16.

It is *not* necessary that the employees show that the benefit is accrued. Also by definition, a priority category 6 benefit cannot be accrued. All accrued benefits are nonforfeitable as of termination. *See*, 26 U.S.C. §411(d)(3)(A) (1983). Therefore, an accrued benefit would necessarily be covered in priority categories 1 through 5. *See, Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1415 (2nd Cir. 1985); 4 Employment Coordinator §B-21, 431 (Dec. 1985 supp.). The *Amato* case dealt with many issues including whether 29 U.S.C. §1344(a)(6) required payment of unaccrued early retirement benefits or a partial termination of a pension plan. After a lengthy discussion, the court concluded that the unaccrued early retirement benefits must be paid. The court noted in part:

> The Joint Explanatory Statement of the Senate-House Conference Committee on the history of ERISA §4044 supports appellants' argument that category six is not limited to accrued benefits. H.Conf.Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Ad.News 5038, 5154-55. The House version of the bill included among the benefits for which funds had to be allocated a category entitled "other accrued benefits." The Conference rejected this version and substituted "all other benefits under the Plan," the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

The case of *Sutton v. Weirton Steel Div. of Nat. Steel*, 724 F.2d 406 (4th Cir. 1983) *cert. denied*, 104 S.Ct. 2387 (1984), specifically calls early retirement benefits of this sort "contingent *benefits*."[2] (Emphasis added.)

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[2] Both parties have cited *Sutton* as holding in their favor in the Fourth Circuit. Because it is a Fourth Circuit case close to this issue, it deserves some analysis. In *Sutton*, National Steel Corp. sold its Weirton Steel Division to a new company, Weirton Steel Corp., which was owned by the Division's employees. The agreement for sale provided for amendment of certain pension and severance benefits contained in the collective bargaining agreements for union employees. The union agreed to the changes, which included elimination of an *unfunded* early retirement benefit.

The employees now wanted to have their cake and eat it too. They had bargained away their contractual right to early retirement benefits as part of the consideration in the company's sale. Therefore, they had no contractual right to the benefits. The employees, therefore, sued, claiming that ERISA guaranteed these benefits. The Fourth Circuit rejected their claim, noting: "Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements." 724 F.2d at 410. The employees failed because their right to early retirement was not a funded part of the pension plan. "It is the unfunded nature of National's contingent liability that distinguishes this case from the cases on which the appellants rely . . . . " 724 F.2d at 412.

The court's decision was well reasoned. If *Sutton* had held for the employees, then it would have expanded the scope of ERISA beyond the pension fund into all employee benefits. In *Sutton*, the employees bargained away their contractual rights to an early retirement. The Mead employees have received

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When §1344(a)(6) says that priority category 6 includes all benefits, it means exactly that: ALL BENEFITS. The statute does not say "all accrued benefits" or "all nonforfeitable benefits," it merely says "all benefits."

(b) *The Early Retirement Benefit In This Case Is A "Benefit Under The Plan".*

"Under the plan" clearly means provided for by the plan. In this case, the early retirement benefit was clearly under the plan. The benefit was provided for in the plan. *See,* Plan Article V, Section 2(b).

3. *Category 6 Benefits Must Be paid.*

The clear language of 29 U.S.C. §1344(a) mandates that "The plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order: [priority categories 1 through 6]." Despite the fact that category 6 is the last asset to be paid, if funds are available, the statute unambiguously orders the plan administrator to pay category 6 benefits. In this case, funds were available (over $10,000,000), but the Mead plan administrator refused to pay the benefits.

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nothing for the loss of their right to an early retirement. In *Sutton,* the benefits were unfunded. Here the benefits were funded. In *Sutton,* there was no recoupment by the employer. Mead has recouped millions from their employees' pension fund. *Sutton* dealt with an amendment *not* governed by 29 U.S.C. §1344. This is a termination, governed by §1344.

B. ERISA Requires That The Funds Earmarked For Early Retirement Benefits Be Paid.

The controlling section of ERISA law which determines when an employer may recoup funds is 29 U.S.C. §1344(d)(1):

> (d) Distribution of residual assets; remaining assets. (1) Any residual assets of a single-employer plan may be distributed to the employer if – (A) all liabilities of the plan to participants and their beneficiaries have been satisfied; (B) the distribution does not contravene any provision of law; and (C) the plan provides for such a distribution in these circumstances.

In this case all liabilities have not been paid. The plan does not provide for a distribution in these circumstances. Mead has therefore violated (A) and (C) above.

1. *ERISA Requires All Liabilities To Be Paid Before The Employer May Recoup Any Funds.*

ERISA §1344(d)(1)(A) quoted above mandates that all liabilities of the plan to participants and their beneficiaries must be satisfied before the employer may recoup any funds.

(a) *Early Retirement Benefits Are A Liability To The Plan.*

(i) *Common Legal Usage Of The Term "Liability" Would Include Contingent Early Retirement Benefits.*

What is a liability? The foremost legal source on definitions enlightens us as follows:

> Liability. The word is a broad legal term. It has been referred to as of the most comprehensive significance, *including almost every character of hazard or*

responsibility, absolute, contingent, or likely. It has been defined to mean: *all character of debts and obligations;* amenability or responsibility; an obligation one is bound in law or justice to perform; *an obligation which may or may not ripen into a debt; any kind of debt or liability, either absolute or contingent,* express or implied; *condition of being actually or potentially subject to an obligation;* condition of being responsible for a possible or actual loss, penalty, evil, expense or burden; *condition which creates a duty to perform an act immediately or in the future;* duty to pay money or perform some other service; duty which must at least eventually be performed; *every kind of legal obligation,* responsibility or duty; fixed liability; legal responsibility; penalty for failure to pay tax when due; present, current, *future, fixed or contingent debts;* punishment; responsibility for torts; that which one is under obligation to pay, or for which one is liable; the state of being bound or obliged in law or justice to do, pay or make good something; the state of one who is bound in law and justice to do something which may be enforced by action; *unliquidated claim.*

All the claims against a corporation. Liabilities include accounts and wages and salaries payable, dividends declared payable, accrued taxes payable, fixed or long-term liabilities, such as mortgage bonds, debentures and bank loans.

Black's Law Dictionary 823 (5th ed. 1979). (Citations omitted.) (Emphasis added.)

The definition of liability is a very expansive one which easily encompasses the contingent legal obligation to pay early retirement benefits. (It is noteworthy that Congress avoided more limited terms such as "contingent," "vested" or "nonforfeitable," and instead went to the much broader term "all liabilities.")

Mead has not paid all liabilities. The early retirement benefits were a contingent debt, a contractual duty, a liability which Mead has yet to pay.

(ii) *Federal Revenue Ruling 85-6 Defines Liability To Include Contingent Early Retirement Benefits Such As Those In This Case.*

ERISA plans are governed not only by general law, but also under tax law. *See,* 26 U.S.C. §§401, *et seq.* Section 401(a)(2) of the I.R.C. requires it must be impossible under the trust instrument: "at any time prior to the satisfaction of *all liabilities* with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries . . . ." (Emphasis added.)

Almost the same language is used in 29 U.S.C. §1103(c) (1983) and in 29 U.S.C. §1344(d)(1)(A) (1983) discussed above. Both 29 U.S.C. §1344(d)(1)(A) and 26 U.S.C. §401(a)(2) use the term "all liabilities" in the context of what must be paid to employees before an employer may recoup funds. Both sections cover the same problem and should be read *in pari materia.* Whether the definition of "all liabilities" in the two sections includes funded contingent early retirement benefits is the crux of employees' argument.

In an almost identical factual situation directly on point, Revenue Ruling 85-6 holds unambiguously that the definition of "all liabilities" in 26 U.S.C. §401(a)(2) includes funded contingent early retirement benefits of the sort the employees are claiming in this action.

The facts stated in the ruling are as follows: An employer with a pension plan covered under ERISA provided in the plan that a normal retirement age of 65 and the option that an employee with 30 years of service and age 55 could retire with full benefits. (The Mead plan is the same except that it requires age 62 instead of 55.) The employer proposed to terminate the plan. In its proposal, the employer would not pay any amount for the value of the early retirement subsidy unless the participant met *both* the age and years of service criteria. (Mead is maintaining the same position in this suit.)

In rejecting the employer's proposal, the revenue ruling noted that, for those employees who could later meet the pretermination conditions, the option of early retirement was a liability under 26 U.S.C. §401(a)(2) and therefore must be paid to the employee. "Until the liabilities for these benefits are satisfied, the employer may not recover any remaining funds as surplus resulting from actuarial error without disqualifying the plan." Four of the employees, Tilley, Reed, Weddle and Goode, have over 30 years of service and will shortly reach the age of 62, therefore satisfying the pretermination conditions.[3]

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[3] After the initiation of this suit, plaintiff David H. Wall died before reaching the age of 62. Despite the fact that Wall can no longer reach age 62, his estate should still be entitled to the increased benefit. Mead originally elected to pay benefits in a lump sum instead of a wait-and-see basis. They should now be estopped from selectively looking forward past the date of distribution to see where they might benefit by taking a wait-and-see posture. Wall's estate, therefore, should receive an actuarially reduced early retirement benefit.

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This is exactly the situation which Revenue Ruling 85-6 addressed. At least these four employees should recover under this ruling. The other two employees rely on other sections of this brief for recovery.[4]

(iii) *The Federal Regulation's Definition Of "Liabilities" Includes Benefits Of The Sort Involved In This Action.*

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William L. Crotts also should recover despite the fact that he falls short of meeting either criteria. Mead had funded the possibility of his early retirement. It was an option which rested solely in Mr. Crotts' hands. If the plan had continued and Crotts elected an early retirement, Mead would have had to pay the earmarked funds. Instead, Mead pocketed the money, profiting from termination of the plan. Mead should not be able to profit from terminating an employee pension plan. The purpose of those funds was that they were to benefit the participants, not Mead. Mr. Crotts should be compensated for the loss of his early retirement benefit.

[4] Revenue Ruling 85-6 deals with two I.R.C. sections: 401(a)(2) and 411(d)(6), the latter of which was amended by the Retirement Equity Act of 1984. This amendment would not apply to the case at hand because the plan was terminated in 1983, prior to the effective date of the amendment. Note, however, that the Revenue Ruling is holding that the amendment does *not* change the *prior* law in this area. "The Bill does not provide an exception to the prohibition against the reduction or elimination of benefit options in the case of a terminated plan." The Revenue Ruling holding states that the law in this area was the same both before and after the 1984 amendment.

However, whether or not the 1984 amendment affected 411(d)(6), the Revenue Ruling would be of the same value to the appellants because *the key section on determining liabilities is 401(a)(2), which was not affected by the amendment*. It is the Revenue Ruling's interpretation of this section on which the employees rely.

I.R.C. regulations make it clear that employees do not have to satisfy all the requirements for immediate payment of a benefit in order for that benefit to be a "liability."

> The term "liabilities" as used in §401(a)(2) includes both fixed and *contingent* obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute "liabilities" within the meaning of that term. It must be impossible for the employer (or other non-employee) to recover any amounts other than such amounts as remain in the trust because of erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect, irrespective of whether the obligations to employees have their source in the trust instrument itself, in the plan of which the trust forms a part, or in some collateral instrument or arrangement forming a part of such plan, and regardless of whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.

26 C.F.R. §1.401-2(b)(2) (emphasis added).

The fact that the employees did not yet have all of the requirements for an early retirement benefit does not prevent the benefit from being a "liability" which must be satisfied before Mead may recoup any funds.

(b) *All Liabilities Must Be Paid Before Mead May Recoup Any Funds.*

The plain language of 29 U.S.C. §1344(d)(l)(A) (1983) mandates that Mead may not recoup any funds unless "all liabilities of the plan to participants and their beneficiaries have been paid." Mead has not paid all liabilities. Therefore, their recoupment of funds was illegal under ERISA.

2. *The Plan Did Not Provide For A Distribution To Mead In This Case.*

(a) *The Funds Recouped By Mead Earmarked For Payment Of Early Retirement Benefits Were Not Due To "Actuarial Error."*

Federal regulations found in 29 C.F.R. §1.401(2)(b)(1) help define "actuarial error."

> (b) Meaning of "liabilities." (1) The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. *A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements* even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding. For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with the provisions of the plan. Upon such liquidation it is found

that $950,000 will satisfy all the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation. *If, however, the surplus of $50,000 had been accumulated as a result of a change in the benefit provisions or in the eligibility requirements of the plan, the $50,000 could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation.*

(Emphasis added.) Note that the regulations require that the surplus be the result of an error in computation, not because of a change in benefits. Here Mead recouped the funds for the employees' early retirement benefits because Mead terminated the benefit. This is not actuarial error.

(b) *Since The Funds Were Not Due To Actuarial Error, Mead May Not Retain Them.*

Whether or not the pension plan allows for the funds earmarked for early retirement benefits to be distributed to the employees at the termination of the plan, if the plan has no provision whereby Mead can recover the funds, then Mead must distribute them to the employees.

Article XIII, Section 4(c) of the plan provides:

(c) In case of the complete termination of the Plan (or partial termination as determined by the United States Department of the Treasury) *the assets of the Plan available to provide benefits shall be allocated among Participants and Beneficiaries* in the following order:

(v) Fifth, *to all other benefits under the Plan.*

(Emphasis added.) The language of Section 4(c) mandates that the assets of the plan "shall be allocated among Participants and Beneficiaries," and is almost identical to the language of 29 U.S.C. §1344(a):

(a) Order of priority of participants and beneficiaries. In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(6) Sixth, to all other benefits under the plan.

This language has been interpreted as generally prohibiting the employer from recouping any funds from the pension plan. Both the Mead plan and ERISA provide only one exception to this general rule. Any part of the trust fund remaining due to *actuarial error* may be recouped by the employer. Under both the plan and ERISA, this is the *only* exception. *International Union United Auto v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984); Mead Pension Plan Article XIII, Section 4(f). If Mead cannot demonstrate that it meets this exception, then the residual assets in the plan held for the contingency of early retirement must be distributed to the plan's participants and beneficiaries. *See, Audio Fidelity v. P.B.G.C.*, 624 F.2d 513, 516-17 (4th Cir. 1980).

3. *The Pension Plan Should Be Construed In A Light Most Favorable To The Employees.*

If there is a doubt as to how the plan reads, it should be construed against Mead. Virginia, Ohio and Federal laws construe an ambiguity in a contract against the party who prepared it. *See, American Realty Trust v. Chase Manhattan Bank*, 222 Va. 392, 281 S.E.2d 825, 831 (1981)

(condominium project); *Moore v. Reynolds Metals Co. Ret. Program*, 563 F.Supp. 1372 (S.D. Ohio 1983) (pension plan); *see, generally, Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971) (pension plan). It is not disputed in this case that Mead was responsible for drafting the pension plan.

IV. MEAD'S PROPHESIES OF DOOM ARE COMPLETELY UNFOUNDED.

Mead would also have this court believe that a ruling for the employees would spawn hundreds of lawsuits. In fact, the Mead decision is not the first decision in this regard. It is the second. The *Amato, supra,* decision came out in 1985, some three years ago. As of yet, to this author's knowledge, the only other cases currently filed are the *Tilley* case and the corresponding class action. The appropriate statute of limitations has undoubtedly run on most claims and by the time this court renders a decision in this case, the statute of limitations will probably have run on virtually all claims which would have arisen prior to the 1985 *Amato* decision. Therefore, a large amount of actions is unlikely.

Secondly, this case has no impact whatsoever on P.B.G.C. insurance benefits or on benefit funding. Despite the claims that a ruling in favor of the employees would cause less securely funded plans, such a hypothesis is ridiculous. By the very nature of the case, the *Tilley* benefits are only available when there is a fully-funded plan and the employer has taken an asset reversion of contingent benefits. If the plan is underfunded, no benefits would be available to pay for the contingent benefits and the employer would not take an asset reversion.

Contrary to Mead's position, a ruling for the employees would not prevent asset reversions. What Mead asks of this court is its permission to change the actuarial assumptions so that it may pocket funds set aside for contingent benefits. This is not overfunding, but a change of the actuarial assumptions. This has no effect whatsoever on the funding of pensions plans.

Nor does this case have any effect on P.B.G.C. insurance of funded benefits. ERISA sets forth six priority categories in 29 U.S.C. §1344(a). The P.B.G.C. insures only priority categories 3 and 4. 29 U.S.C. §1322. There can be no question under any reading of ERISA that contingent early retirement benefits are a category 6 benefit and therefore not entitled to insurance protection. 29 U.S.C. §1344(a)(6). Further, the employer would only be liable for these funds to the extent that funds are available to pay the contingent benefits as an employer cannot be held liable for category 6 benefits should funds be unavailable to pay those benefits.

Mead further asserts that the employees are asking for the full amount of the early retirement benefit. In fact, all the employees request is the reduced amount of the benefit using the very same actuarial assumptions as were used by Mead in the termination of the pension plan. An employee's normal retirement age was 65. Under the subsidized retirement benefit, he could retire at age 62 with a full benefit. The employees merely ask this court to hold, for those employees who would have been able to reach the early retirement benefit, that their retirement age be based on an age of 62 instead of age 65. Since the employees were obviously paid for work that

was actually earned and their years of service and compensation was taken into account in their normal retirement benefit, both of these would naturally be reflected in the contingent benefit.

CONCLUSION

On page 15 of Mead's Petition, it states that over 50,000 pension plans have been terminated since 1974 affecting millions of employees. At the rate at which pension plans are being terminated, it seems unlikely that a young man just entering into employment could expect that a pension plan in operation at the start of his employment would last until his retirement. If this court holds for Mead, it will have the same effect as rendering early retirement benefits as being completely unenforceable having no effect whatsoever for many if not most employees today.

WHEREFORE, respondents move this court to dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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REPLY BRIEF

(9)

NO. 87-1868

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE MEAD CORPORATION,

Petitioner

v.

B.E. TILLEY, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1pp

RULE 28.1 LIST

Petitioner, The Mead Corporation, amends its Rule 28.1 list of subsidiaries and affiliates to add:

SEIKO MEAD KABUSIKI KAISHA

TABLE OF AUTHORITIES

ARGUMENT

This case presents important issues of law and policy relating to ERISA that Respondents' Brief in Opposition seeks to trivialize by misstating the implications for the courts and the pension system if the decision below is not reversed.

As the Petition makes clear, both the IRS and the PBGC approved the Plan termination at issue in this case,[1] and the district court correctly decided that the subsidized early retirement benefits in question here were not accrued benefits due upon Plan termination under either ERISA or the terms of the Plan. Petition Appendix ("Pet. App.") A at 12a. Moreover the decision below is in irreconcilable conflict with the Retirement Equity Act of 1984 ("REA")[2] and if permitted to stand will create a new class of benefits consisting of unearned "benefit expectations" payable upon plan termination.[3] Under REA only subsidized early retirement benefits which a participant has earned or may later earn are protected, whereas under the Fourth Circuit's view all subsidized early retirement benefits, including those which can never be earned (*e.g.*, because the participant severs employment or

[1] In so doing, the IRS obviously did not interpret its own regulation, Treas. Reg. § 1.401-2(b)(2), to mean that Respondents' unaccrued early retirement benefits were a "liability" which must be paid before Mead could recoup surplus plan assets. Respondents' contrary interpretation of that regulation is incorrect. *See* Respondents' Brief in Opposition ("Br. in Opp.") at p. 22. The liabilities of terminating plans are limited to benefits accrued up to the time of termination. *See* Petition ("Pet.") at p. 11, n. 26.

[2] Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[3] In another context, this Court recently emphasized that courts should take care in interpreting statutes bearing upon pension issues. In *Florida* v. *Long*, 487 U.S. ___, 56 U.S.L.W. 4718 (1988) the Court stated that " 'unless the legislature has plainly commanded that result' . . . 'drastic changes in the legal rules governing pension . . . funds' " should not be applied retroactively since "Congress had . . . stressed the importance of 'making only gradual and prospective changes' in the rules governing pension plans . . . ." *Id.*, Slip Op. at pp. 11-12 [quoting *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 at 721 (1978)]. *See also id.*, 487 U.S. at ___, Slip Op. at 12-13, 14-15.

dies), must be paid out of surplus assets on plan termination before there can be a reversion to the employer. The conflict with REA creates severe ongoing problems for all members of the pension community, including the responsible federal agencies. The passage of REA is at once the most significant indicator that the Fourth Circuit's decision below is incorrect and a major reason why this Court's intervention is required now to decide whether an employer has any duty to pay employees' unearned "benefit expectations" at plan termination. Respondents avoid this important issue.

With respect to the larger implications of the decision below, the Petition and the PBGC's Amicus Brief filed herein have correctly identified an expanding body of new lawsuits by employees seeking retroactive payment of unearned "benefit expectations" in excess of their accrued benefits paid at plan termination. *See* Pet. at p. 17, n. 39, and Brief Amicus Curiae of the Pension Benefit Guaranty Corporation (hereinafter "PBGC Brief") at pp. 3-4, n. 2. Further, Respondents assert that "this case has no impact whatsoever on P.B.G.C. insurance benefits or on benefit funding," and that Mead's claim that the decision below will cause less securely funded plans is "ridiculous" because "*Tilley* benefits are only available when there is a fully-funded plan and the employer has taken an asset reversion of contingent benefits" and because "an employer cannot be held liable for category 6 benefits should funds be unavailable to pay those benefits." (Br. in Opp. at pp. 26, 27).

Respondents appear to be suggesting that an employer simply need not fund category 6 benefits if it wishes to avoid paying unearned benefits.[4] Reducing plan funding, however,

[4] This approach, however, would deprive many participants of retirement benefits accrued under their plan. This is so because category 6 benefits (not category 5 benefits, as Respondents state, Br. in Opp. at p. 14) include all pension benefits accrued under the plan that have not vested before plan termination. *See* 29 C.F.R. § 2618.2 (1981) (defining category 5 benefits). *See also* Brief Amicus Curiae of the Chamber of Commerce of the United States at p. 13 (filed herein).

necessarily increases the risk that plans will terminate with insufficient assets to cover not only PBGC insured benefits (PBGC Brief at pp. 4-5) but also uninsured accrued benefits covered by categories 5 and 6 of ERISA Section 4044(a).

Finally, Respondents incorrectly represent that Revenue Ruling 85-6, 1985-1 C.B. 133, states that the REA rule protecting early retirement subsidies upon plan termination was the same before and after 1984. Br. in Opp. at p. 21, n. 4. The Revenue Ruling does not so state nor does it admit of any such inference. After REA was passed in 1984, Revenue Ruling 85-6 was promulgated expressly to reflect REA's new requirement that funds be set aside upon plan termination to fund contingent early retirement benefits for employees who later meet plan requirements. The Ruling explains how these new, limited contingent liabilities arising from early retirement subsidies that have not yet been earned may be satisfied. *See* Pet. at p. 19. As the Petition and the amici make clear, the court below went much further.

Whether viewed before or after REA, the law simply does not require — as the Fourth Circuit held — that an employee's benefit upon plan termination be calculated as though the employee had actually met the requirements for an early retirement subsidy. In spite of the assertion that four of the six Respondents "will shortly reach the age of 62" (Br. in Opp. at p. 20), the fact is that at the time of Plan termination in 1983 none of the Respondents had reached that age. Even if REA had been applicable, it merely would have required that if the Respondents had continued to work for Mead (which they did not), early retirement subsidies would have to be paid if they retired from Mead *after* meeting all the Plan criteria for the subsidy.

CONCLUSION

For these reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

(10)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF ON NEW EN BANC ELEVENTH CIRCUIT OPINION

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I. THE ELEVENTH CIRCUIT'S EN BANC DECISION IN *BLESSITT* HAS BEEN ISSUED AND IT CONFLICTS IN PRINCIPLE WITH *TILLEY* AND *AMATO*.

Pursuant to Supreme Court Rule 22.6, Petitioner The Mead Corporation ("Mead") files this Supplemental Brief to call to the Court's attention a new case not available at the time of the filing of Mead's Reply Memorandum on July 1, 1988. In its Petition (at p. 15) Mead advised the Court of a forthcoming en banc decision of the Eleventh Circuit. That decision was issued on July 8, 1988. *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1988 U.S. App. LEXIS 9309 (11th Cir. 1988) (en banc) ("LEXIS at ____, slip op. at ____").

The facts, issues and procedural background of *Blessitt* are similar to those in this case: Appellants there were former employees who were participants in a defined benefit plan which terminated before they reached normal retirement age when the plan sponsor, Dixie Engine Company ("Dixie Engine"), sold substantially all of its assets. After the plan paid the employees their accrued normal retirement benefits in lump-sum distributions, the surplus assets reverted to Dixie Engine in accordance with the plan. LEXIS at 3-4, slip op. at 3637.

The employees sued in district court claiming that ERISA entitled them to receive not only that portion of their normal retirement benefit that had accrued at the date of termination, but also unaccrued benefits in the form of all of the benefits they would have been entitled to had they continued working until normal retirement age. The district court granted summary judgment in favor of Dixie Engine, the employees appealed, and a panel of the Eleventh Circuit reversed. 817 F.2d 1528 (11th Cir. 1987). The panel decision,

like the decision below, followed dicta in *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986), and held that if surplus assets remained, appellants must be paid their unaccrued normal retirement benefits under the plan before the surplus could revert. 817 F.2d at 1531.

On rehearing en banc the Eleventh Circuit unanimously reversed. After analyzing the relevant statutes, authoritative interpretations of the responsible federal agencies, case law, and policy considerations, the court held that "ERISA does not require that employees receive a benefit which is calculated on the basis of anticipated future years of service which have not actually been worked as of the termination date." LEXIS at 2-3, slip op. at 3636.[1]

The Eleventh Circuit expressly declined to decide whether ERISA Section 4044(a)(6) ("Category 6") entitles employees to unearned early retirement benefits upon plan termination. LEXIS at 45 n. 31, slip op. at 3652 n. 31. The Eleventh Circuit's reasoning and its construction of ERISA with respect to whether employees are due unearned benefits upon plan termination, however, conflict in principle with that of the Fourth Circuit below and the Second Circuit in *Amato*.[2] That conflict provides another important reason for this Court to grant certiorari.[3]

Most importantly, the Fourth, Second and Eleventh Circuits each examined ERISA, its legislative history, and the regulations of the responsible federal agencies, but the Fourth and Second Circuits' conclusions as to whether ERISA requires unearned benefits to be paid on plan termination conflict with that of the Eleventh Circuit. The Fourth Circuit held below that:

> We are faced with the termination of an employer funded, defined pension plan which contains early retirement benefits, which plan was terminated resulting in recoupment by the employer of ten million dollars. The application of category six of ERISA § 4044 is controlling in our case . . . . *It is clear from the language of the statute, the general legislative history and the interpretation given to it by the Internal Revenue Service that the present plaintiffs are entitled to the early retirement benefits they seek.*

Tilley v. *Mead Corp.*, 815 F.2d 989, 992 (4th Cir. 1987); Petitioner's Appendix A ("Pet. App.") at 7a (emphasis added). *See also Amato*, 773 F.2d at 1415-16. In *Blessitt*, however, the Eleventh Circuit held:

> ERISA does not require that [plaintiff] employees receive a benefit which is calculated on the basis of anticipated future years of service which have not actually been worked as of the termination date.
>
> * * *
>
> [W]e must determine whether such benefits constitute plan liabilities that must be satisfied from plan assets prior to any reversion of residuary assets to the employer upon termination of a defined benefit plan funded entirely by employer contributions. *As indicated in the analysis which follows, the statutes themselves, authoritative interpretations by the regulatory agencies, the caselaw, and policy considerations all point ineluctably to the conclusion that [plaintiffs'] position is untenable.*

---

[1] The Dixie Engine employees have apparently decided to seek Supreme Court review of the *Blessitt* decision. *See* Robertshaw, *Ruling Voided — Court OKs Use of Reversion*, Pensions & Investment Age, July 25, 1988 at 1, 39, col. 1.

[2] Although the narrow holding in *Amato* — that early retirement benefits cannot be eliminated by plan amendment — can be distinguished from that of *Tilley* (*see* Petition at p. 6 n. 12), the rationale of the Second Circuit's *Amato* opinion places it squarely in conflict with the principles enunciated in *Blessitt*.

[3] *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3 at 197 (6th ed. 1986).

LEXIS at 2-3, 9, slip op. at 3636, 3639 (emphasis added).

More specifically, the Fourth and Second Circuits on the one hand, and now the Eleventh on the other hand, have adopted irreconcilable interpretations of Category 6.[4] The Fourth Circuit below and the Second Circuit in *Amato* construed Category 6 as not limited to earned benefits, but as entitling plan participants to pension benefits that at the time of plan termination were not earned under the terms of the plan. The basis for the Fourth and Second Circuits' erroneous construction of Category 6 was the importance both courts attached to the absence of a single word ("accrued") in the final version of Category 6 as conclusive evidence of Congressional intent: " 'Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.' " *Tilley*, 815 F.2d at 992, Pet. App. at 6a (quoting *Amato*, 773 F.2d at 1416). The Eleventh Circuit in *Blessitt* rejected this interpretation:

> [W]e conclude that it is not plausible that Congress intended to include benefits based on anticipated future years of service. . . . To adopt [that] position would mean that the conferees expanded the scope of the priority scheme far beyond that of either of the predecessor bills.
>
> * * *
>
> [A]t the time Congress enacted ERISA, it was well established that retirement benefits were based on years of actual service. If Congress *had* intended to include benefits based on future years of service in Category 6, this would have constituted a major departure from preexisting law and certainly would have merited detailed explanation. However, there is *no* mention in the legislative history that ERISA expanded the concept of benefits to which an employee was entitled to include benefits he possibly would earn in the future. . . . Thus, it seems extremely doubtful that Congress intended to introduce what amounts to a fundamental rethinking of the entire benefits area without *any* discussion or explanation. *See Drummond Coal Co.* v. *Watts*, 735 F.2d 469, 474 (11th Cir. 1984) (elimination of a single word between versions of a bill is an unreliable indicator of Congressional intent, particularly where the deletion is not explained).

LEXIS at 48-50, slip op. at 3653-54 (emphasis in original).

Finally, the Eleventh Circuit's construction of ERISA in *Blessitt* is based in large part on its adherence to this Court's directives that federal courts must give great deference to the interpretations and regulations of the administrative agencies responsible for enforcing and interpreting a statutory scheme. *See* LEXIS at 11-13, slip op. at 3640-41.[5] The Eleventh Circuit carefully considered the views of the PBGC, the IRS and the Department of Labor and concluded that "Blessitt's argument that he is entitled to benefits he expects to accrue through his anticipated future years of service directly conflicts with these administrative interpretations to which [we] owe deference." LEXIS at 25, slip op. at 3645. After noting that "we owe particularly great deference to PBGC interpretations of Title IV of ERISA . . . [and] to the PBGC's interpretation of its own regulations," LEXIS at 26 n. 19, slip op. at 3645 n. 19, the court said:

[4] In all likelihood an additional circuit will very soon render another decision on whether ERISA entitles employees to unearned early retirement benefits. On March 17, 1988, oral argument was held before the Third Circuit Court of Appeals in *Ashenbaugh* v. *Crucible, Inc., appeal pending*, No. 87-3722. In that case, the benefits under the plan, the employees' contentions, and the issues on appeal are very similar to those in the present case.

[5] "As the Supreme Court stated, 'a court that tries to chart a true course to the Act's purpose embarks on a voyage without a compass when it disregards the agency's views.' " LEXIS at 11, slip op. at 3640 (quoting *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 568 (1980)).

The PBGC consistently has construed Category 6 to include only benefits actually accrued as of the termination date according to the terms of the plan. Blessitt's assertion that Category 6 includes unaccrued benefits based on future years of service not actually worked is inconsistent with the PBGC's longstanding position.

LEXIS at 26, slip op. at 3645. In the present case the PBGC advised the Fourth Circuit, exactly as it did the Eleventh Circuit in *Blessitt*, that ERISA does not require the payment of unaccrued benefits at plan termination. The Fourth Circuit denied Mead's petition for rehearing without even mentioning the PBGC's views.

II. THE ELEVENTH CIRCUIT'S ATTEMPT TO RECONCILE *BLESSITT* WITH *TILLEY* AND *AMATO* FAILS.

Although both the reasoning and result in *Blessitt* conflict with *Tilley* and *Amato*, the Eleventh Circuit attempted to reconcile the three decisions rather than to disagree explicitly with the Fourth and Second Circuits. These three decisions, however, are irreconcilable. If Category 6 does not create substantive rights for employees to recover unearned normal retirement benefits at plan termination as *Blessitt* held, then neither does it create substantive rights for them to recover any other unearned pension benefits (such as early retirement benefits) as *Tilley* held.[6] The distinction *Blessitt* draws between unaccrued normal retirement benefits and unaccrued early retirement or other unaccrued benefits does not exist.

The *Blessitt* plaintiffs relied heavily on *Amato* and *Tilley*, and the Eleventh Circuit responded by asserting that neither

[6] The PBGC agrees: "Category six . . . does not include the mere expectation of benefits not accrued on the date of plan termination, and that may never be payable under the plan." PBGC's Amicus Brief at 9. Although the PBGC as an amicus is precluded from filing a supplemental brief, this Court could request such a brief if it wishes to know the PBGC's views regarding the importance of review of the present case after *Blessitt*.

of those cases "awarded benefits based on an employee's expected future years of service." LEXIS at 31, slip op. at 3647. That statement is incorrect. It is clear that under the principles announced in both *Amato* and *Tilley* that employees would receive at least proportionate early retirement benefits based upon the years of service actually worked, even though under the terms of their plans the employees had not yet earned the right to *any* early retirement benefits. Normal retirement benefits accrue incrementally each year an employee participates in a pension plan. Early retirement benefits do not; they are not payable at all unless and until the employee actually satisfies the plan's years of service and age criteria for the benefit. *See* note 9, *infra*. Therefore a court must assume that the required future years of service will occur in order to award even proportionate early retirement benefits. Thus the relief approved below and in *Amato* is necessarily based on the employees' "expected future years of service."

In addition to being incorrect, the Eleventh Circuit's treatment of the relief sanctioned in *Amato* and *Tilley* is inconsistent with several other key portions of its opinion. As the Eleventh Circuit correctly pointed out in the very same section of its opinion, under Internal Revenue Code Section 411(d)(6), as amended by the Retirement Equity Act of 1984 ("REA"), "the employees in *Amato* and *Tilley* could not receive *any portion* of their early retirement benefits unless and until they actually met the . . . age and years of service requirements [of the plan]." LEXIS at 35-36, slip op. at 3648-49 (emphasis added). The court thus recognized that *Tilley* and *Amato* conflict with REA, but failed to appreciate the legal significance of that fact.[7] Also, the court's suggestion

[7] Prior to the enactment of REA, early retirement benefits not yet earned could be completely eliminated by plan termination. REA prohibits complete elimination of such benefits and generally requires that early retirement benefits be paid if and when employees meet the age and service requirements set out in the plan, even if these requirements are satisfied after termination of the plan. REA § 301(a), amending ERISA § 204(g), 29 U.S.C. § 1054(g) and I.R.C. § 411(d)(6). *See* Petition at 18-20 and Reply

that the relief approved in *Amato* and *Tilley* is acceptable disregards a key analytical underpinning of the entire *Blessitt* opinion — that at plan termination employees can receive only those benefits due "*under the plan*" rather than their benefit expectations. *See, e.g.*, LEXIS at 16, slip op. at 3642 (emphasis in original).

III. THE CONFLICT IN PRINCIPLE BETWEEN THE CIRCUITS AND THE IMPORTANCE OF THE ISSUE PRESENTED IN THIS CASE REQUIRE SUPREME COURT REVIEW OF THE DECISION BELOW.

The key issue in *Tilley*, *Blessitt* and *Amato* is whether ERISA requires the payment of *any* unearned benefits upon plan termination. That issue remains unresolved. The express holding in *Blessitt* is that there is no such requirement for unearned normal retirement benefits. In its analytical approach and philosophical basis, the *Blessitt* opinion is at opposite poles from both *Tilley* and *Amato*. By straining to craft an opinion that does not appear to conflict directly with the Second and Fourth Circuits, the Eleventh Circuit has nevertheless created a conflict in principle which, together with this important unresolved issue, requires Supreme Court review.

The unresolved issue in this case affects tens of thousands of plans and millions of plan participants. The monetary exposure remains staggering and it could well have a material and adverse impact on the PBGC.

Both the Second and Fourth Circuits were aware of the enactment of REA,[8] yet both ignored its import and held that

Brief at 3; PBGC's Amicus Brief at 7 n. 4 (discussing REA). Since respondents' employment was severed when Mead sold the Foundry and terminated its plan, they will never satisfy the plan's requirements for early retirement benefits. *See* Petition at pp. 3, and 19 n. 42.

[8] *Amato*, 773 F.2d at 1410-11, *Tilley* v. *Mead Corp.*, No. 84-0751 (W.D. Va. Apr. 18, 1986), Pet. App. at 12a n. 4.

benefits in excess of those earned under the provisions of a pension plan were payable to employees upon plan termination.[9] Thus even after REA, claims for unearned early retirement benefits based on *Amato* and *Tilley* are being raised and can continue to be raised in any federal court, including those in the Eleventh Circuit. Moreover, in every circuit but the Eleventh, plaintiffs remain free to seek unearned normal retirement benefits under the *Amato-Tilley* "benefit expectations" theory.

The numerous class actions already being litigated cannot be correctly resolved without this Court's guidance.[10] Serious uncertainties persist for the lower federal courts, the PBGC, employers, employees, and the pension community concerning the rights of employees to recover unearned benefits upon plan termination. To resolve the conflict, dispel the confusion, and stem the rising tide of litigation, this Court should grant certiorari to review this case either alone or in conjunction with *Blessitt* and authoritatively determine for all circuits that ERISA does not require an employer to pay *any* benefits from a terminating pension plan to employees who have not yet earned them by satisfying the terms of the plan.

[9] In recently released final regulations that govern employee rights under REA, the IRS has confirmed that early retirement benefits that have not been earned are not protected by I.R.C. § 411(d)(6). Treas. Reg. § 1.411(d)-4: Q&A1 (1988), 53 Fed. Reg. 26,050, 26,058 (July 11, 1988). In a specific example the IRS makes it clear that, even after REA, an employee who terminates employment and elects to receive the value of the employee's accrued normal retirement benefit in a single sum upon plan termination is not entitled to any portion of a subsidized early retirement benefit since the employee had not met the early retirement criteria under the plan. *Id.* at Q&A2(a)(2)(iv) (Ex. 1, employee X), 53 Fed. Reg. at 26,060.

[10] *See* Petition at 17 n. 39, PBGC Amicus Brief at 3-4 n. 2. In *Ashenbaugh*, *supra* at 4 n. 4, the original complaint involved 149 individual plaintiffs; a follow-on class action involving an additional 280 participants has since been filed. *Nobers* v. *Crucible, Inc. 1975 Salaried Retirement Plan*, No. 88-1237 (W.D. Pa. filed May 31, 1988).

CONCLUSION

For these additional reasons, the petition for a writ of certiorari should be granted.

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ARGUMENT

THE THIRD CIRCUIT'S DECISION IN *ASHENBAUGH* HAS BEEN ISSUED, AND IT DIRECTLY CONFLICTS WITH *TILLEY* AND *AMATO*.

Pursuant to Supreme Court Rule 22.6, Petitioner The Mead Corporation ("Mead") files this second supplemental brief to call to the Court's attention a new case decided after Mead filed its first supplemental brief on August 6, 1988. In that brief (at p. 4 n.4) Mead advised the Court of a case presenting very similar issues pending before the Third Circuit. That case was decided on August 23, 1988. *Ashenbaugh* v. *Crucible Inc., 1975 Salaried Retirement Plan*, No. 87-3722, 1988 U.S. App. LEXIS 11597 (3d Cir. Aug. 23, 1988), *petition for reh'g en banc*, (Sept. 6, 1988), ("LEXIS at ____, slip op. at ____.")

In *Ashenbaugh*, as in the instant case, the employee-plaintiffs were participants in a single-employer defined benefit pension plan (the "Crucible Plan") that was subject to the qualification rules of the Internal Revenue Code (LEXIS at 2, slip op. at 4) and the pension termination insurance provisions of the Pension Benefit Guaranty Corporation ("PBGC") under ERISA. The plan sponsor, Colt Industries Operating Corporation, permanently shut down its plant at Midland, Pennsylvania, and the participants' employment relationship was severed. Because the Crucible Plan covered locations other than Midland it was not terminated; however, because of the number of employees involved in the Midland plant shutdown, the Internal Revenue Service ("IRS") determined that the Crucible Plan was partially terminated. The legal result of the partial termination was that all Midland participants became one hundred percent vested in their accrued benefits. LEXIS at 4, slip op. at 5.[1]

[1] IRC § 411(d)(3) requires that upon the complete or partial termination of a plan, "the rights of all affected employees to benefits accrued to the date of such . . . termination . . . are nonforfeitable."

The Crucible Plan provided, *inter alia*, a subsidized early retirement benefit identical to the one in the present case: if an employee retired after age 62 and after 30 years of service, that employee would receive a full benefit under the Plan's formula without any actuarial reduction because benefits would begin before age 65.[2]

One hundred and forty-nine Midland employees brought suit[3] claiming, *inter alia*, that participants who completed fewer than 30 years of service were nevertheless entitled to a portion of the Plan's subsidized early retirement benefit.[4] The employees relied upon *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986), the Fourth Circuit decision below, and the Eleventh Circuit panel decision in *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *vacated, reh'g granted*, 836 F.2d 1571, *op. on reh'g*, 848 F.2d 1164 (1988) (en banc) (reaching opposite conclusion). They argued that under *Amato* the early retirement benefit was an accrued benefit which vested upon the partial termination of the Crucible Plan. LEXIS at 26-27, slip op. at 21-22. They also argued, as did the former Mead employees below, that under another portion of *Amato*, Section 4044 of ERISA ("Section 4044")[5] created a substantive right to receive subsidized early retirement benefits upon plan termination. LEXIS at 11-12, slip op. at 12.[6]

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[2] *Compare* Mead's Plan, Pet. App. at 20a, *with* Crucible's Plan, LEXIS at 5-6, slip op. at 7.

[3] *Ashenbaugh* is not a class action. However, a follow-on class action involving an additional 280 employees is also pending. *Nobers* v. *Crucible Inc. 1975 Salaried Retirement Plan*, No. 88-1237 (W.D. Pa. filed May 31, 1988).

[4] LEXIS at 9, slip op. at 10.

[5] 29 U.S.C. § 1344 ("Section 1344"). The *Ashenbaugh* opinion uses Section 4044 and the parallel citation, Section 1344, interchangeably.

[6] A portion of *Amato*, 773 F.2d at 1407-1414, holds that subsidized early retirement benefits are accrued benefits which cannot be eliminated by plan amendment. Another portion of *Amato*, 773 F.2d at 1414-1416, suggests that § 4044(a) creates a substantive right to recover participants' "benefit expectations" upon plan termination. *Id.* at 1416. The Respondent-employees in *Tilley* relied on the second portion of *Amato* in support of their claim for unearned subsidized early retirement benefits upon plan termination.

The district court rejected the employees' claims. On appeal the Third Circuit, in a 2-1 decision, affirmed. The majority opinion stated that "plaintiffs' argument not only misconstrues . . . the relevant law, but misperceives [its] purposes as well." LEXIS at 18, slip op. at 16. There are five points in the *Ashenbaugh* majority opinion that are significant to the instant petition for certiorari.

First, the Third Circuit emphatically rejected the employees' claim (identical to that of the employees in the present case) that Section 4044 created a substantive right to receive payment of subsidized early retirement benefits. The court held:

> We . . . disagree with *Amato*, and affirm the district court's holding in this case that ERISA § 4044 is an ordering provision rather than one that creates substantive rights. . . . *Amato* held that § 1344(a)(6) entitled participants of a fully-funded plan to receive contingent benefits even though the specified contingencies had not occurred. . . . The Fourth Circuit has followed *Amato*'s interpretation of § 1344(a), in *Tilley* v. *Mead Corp.*, 815 F.2d 989 (4th Cir. 1987).

LEXIS at 35-37, slip op. at 27-28. This holding by the Third Circuit conflicts directly with both the Fourth Circuit's decision below and with the Second Circuit's opinion in *Amato*.[7]

---

[7] Mead has argued that *Amato*, which dealt with an attempt to reduce early retirement benefits via a plan amendment, is distinguishable from cases where there has been a full or partial plan termination. *See* Pet. at 6-7 n.12. Mead has also characterized as *dicta* that portion of *Amato* which suggests that § 4044(a) creates substantive rights to early retirement benefits. *Id.* However, the employee-plaintiffs in *Tilley*, *Blessitt* and *Ashenbaugh*

Second, the Third Circuit rejected the employees' argument that subsidized early retirement benefits were accrued benefits whether or not the employees had met the criteria set forth in the plan itself for those benefits. In holding that such benefits are not accrued benefits, the Third Circuit expressly adhered to its earlier decision in *Bencivenga* v. *Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985), and specifically rejected the contrary holding in *Amato*. LEXIS at 27, slip op. at 22. *Ashenbaugh's* holding thus conflicts directly with the result reached by the Fourth Circuit below and with the holding of the Second Circuit in *Amato*.

Third, the *Ashenbaugh* majority found significant support for its decision rejecting the employees' claim for unearned early retirement benefits in the enactment of the Retirement Equity Act of 1984 ("REA").[8] LEXIS at 35; slip op. at 27. The Third Circuit thus fully appreciated the legal significance of the conflict between the broad relief sought by the employees in *Ashenbaugh* and the instant case and the narrow relief Congress created in REA. *See* Pet. at 20; Mead's Reply Memorandum at 2; Mead's Supplemental Brief at 7.[9]

Fourth, the *Ashenbaugh* decision — unlike the decision below — gave proper deference to the views of the PBCG, which filed an amicus brief supporting the Crucible Plan. *See* LEXIS at 24-25, 37-38, slip op. at 20, 29.

have all relied upon that specific portion of the *Amato* opinion and the lower federal courts have considered that portion of *Amato* as a holding. *See, e.g., Ashenbaugh*, LEXIS at 35, 36, slip op. at 27, 28; *Tilley*, 815 F.2d at 991; *Blessitt*, 817 F.2d at 1531 (panel decision.)

[8] Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[9] The Third Circuit stated that REA's protection of subsidized early retirement benefits "applies to a participant *only if* the participant meets the conditions imposed by the plan on the availability of the subsidy." LEXIS at 32-33, slip op. at 25 (emphasis added) (quoting S.Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574).

Fifth and finally, *Ashenbaugh* recognizes that the Eleventh Circuit's effort to reconcile its *en banc* decision in *Blessitt* with *Tilley* and *Amato* fails. Drawing no distinction between the unearned normal retirement benefits at issue in *Blessitt* and unearned subsidized early retirement benefits, the Third Circuit held simply that the *en banc* decision in *Blessitt* rejected *Amato's* construction of Section 4044. LEXIS at 37, slip op. at 28-29. The Third Circuit held that "[*Blessitt's*] holding is squarely against the plaintiffs in this case, who make an identical claim under § [4044]." LEXIS at 37, slip op. at 29. Thus — in spite of the Eleventh Circuit's efforts to reconcile the results reached below and in *Amato* with its own *en banc* holding — the Third Circuit concluded that *Blessitt* stands in direct conflict with *Amato* and *Tilley*. LEXIS at 36-37, slip op. at 28-29.

This Court is now confronted with direct conflict among the circuits as to whether ERISA creates substantive rights to subsidized early retirement benefits for employees who have not earned those benefits. The decision below and *Amato* cannot co-exist with the results or the reasoning of *Blessitt* and *Ashenbaugh*. ERISA simply cannot be read to require an employer to pay any benefits from a pension plan to employees who have not yet earned them by satisfying plan requirements. Because of the importance of this issue, the conflict should be resolved now.

CONCLUSION

For these additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

87-1868

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE MEAD CORPORATION,

Petitioner,

—v.—

B.E. TILLEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

American Paper Institute, Inc. ("API") submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of The Mead Corporation, petitioner in No. 87-1868, having obtained the written consent of both the petitioner and the respondents to file same.

INTEREST OF THE AMICUS CURIAE

API is the national trade association of the pulp, paper and paperboard manufacturing industry. The approximately 170 member companies of API produce over 90% of the pulp, paper and paperboard manufactured in the United States. API respectfully submits this brief *amicus curiae* to urge this Court to

review and reverse the decision of the Court of Appeals for the Fourth Circuit, which erred in holding that Section 4044(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, requires terminating pension plans to pay unaccrued early retirement benefits before any assets may revert to the sponsoring employer. API is interested in this petition for certiorari because most of its members sponsor at least one defined benefit pension plan. Many of these plans provide some form of early retirement benefit. The Fourth Circuit's decision, if allowed to stand, will have deleterious effects throughout the paper industry, and many other industries, by discouraging the establishment and secure funding of defined benefit pension plans and the provision of early retirement benefits.

ARGUMENT

I

THE FOURTH CIRCUIT'S DECISION SERIOUSLY JEOPARDIZES THE STABILITY OF THE PRIVATE PENSION SYSTEM

A. Unless Reversed by This Court, the Fourth Circuit's Decision Will Wreak Havoc on the Administration of Terminating Plans and Will Undermine ERISA's Policy of Uniform Regulation and Administration of Pension Plans

The Fourth Circuit's decision in *Tilley* v. *Mead Corp.*, 815 F.2d 989 (4th Cir. 1987), *reh'g denied*, No. 86-3858 (4th Cir. Feb. 17, 1988), is contrary to the longstanding interpretation of the termination provisions of ERISA and will lead to confusion and uncertainty in the administration of pension plan terminations. ERISA is the comprehensive remedial statute enacted to protect the pension benefits of participants and beneficiaries. *See Nachman* v. *PBGC*, 446 U.S. 359, 361 (1980). The Pension Benefit Guaranty Corporation (the "PBGC"), pursuant to Title IV of ERISA, and the Internal Revenue Service (the "IRS"), pursuant to Title II of ERISA, administer the terminations of qualified defined benefit pension plans. Prior to termination, a

defined benefit pension plan must submit its plan of termination to the PBGC together with an actuary's certification that the plan assets are sufficient to pay all benefits required under the plan. Section 4041(a) of ERISA, 29 U.S.C. § 1341(a).[1] Most qualified pension plans also are submitted to the IRS for a determination that all benefit liabilities required under the plan were satisfied.[2] The PBGC issued a "Notice of Sufficiency" and the IRS issued a favorable determination in connection with the Mead Plan's termination. *See* Apps. H and G to Mead's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ("Petition").

The PBGC and the IRS consistently have interpreted and administered ERISA to require that only benefits earned under the terms of a plan be paid upon termination. Brief of Amicus Curiae PBGC in Support of [Mead's] Petition for Rehearing and Suggestion of Rehearing En Banc ("PBGC Brief") at 12, *Tilley*. *See* PBGC Opinion Letter 87-11 (Oct. 22, 1987) (copy attached as App. K to Petition); PBGC Opinion Letter 86-1 (Jan. 15, 1986) (copy attached as App. K to Petition); IRS Gen. Couns. Mem. 39665 at 2-3 (Sept. 25, 1987); Rev. Rul. 71-152, 1971-1 C.B. 126, *revoked and restated by* Rev. Rul. 83-52, 1983-1 C.B. 87 (restating the same position after the passage of ERISA), *superseded by* Rev. Rul. 85-6, 1985-1 C.B. 133 (restating the same position after the passage of the Retirement Equity Act of 1984 ("REA")).[3] Contrary to the opinion of the PBGC

1 At the time of the Mead Plan termination, pension plans were required to obtain a "Notice of Sufficiency" from the PBGC before plan assets could be distributed. ERISA § 4041(a), 29 U.S.C. § 1341(a) (1983).

2 A favorable determination upon plan termination is important because, for example, only distributions from plans that are qualified at the time of termination may be "rolled over" by participants into individual retirement accounts under IRC § 402(a)(5), 26 U.S.C. § 402(a)(5), thus deferring taxation, or may be afforded special income averaging treatment under IRC § 402(e), 26 U.S.C. § 402(e).

3 The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of Titles 26 and 29 of the United States Code), is discussed *infra* at 17-18.

and the IRS, the Fourth Circuit held that Section 4044(a)(6) of ERISA requires plans to "meet participants' benefit expectations" by paying unaccrued early retirement benefits before any remaining plan assets may revert to the employer. 815 F.2d at 992 (citing *Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985) (dictum), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986)).

Subsequent to the Fourth Circuit's decision in *Tilley*, the Court of Appeals for the Eleventh Circuit, in *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *reh'g en banc granted*, 836 F.2d 1571 (11th Cir. 1988),[4] construed Section 4044(a)(6) to require plans to pay all "benefits promised under the plan but not yet accrued" before any assets may revert to the employer. 817 F.2d at 1531. The court in *Blessitt* held that, upon termination, the plan must calculate all participants' benefits as if their employment terminated on their normal retirement date. Since the normal retirement age under the plan at issue in *Blessitt* was sixty-five years, a person who was twenty-five years of age with three years of service when the plan terminated would receive the actuarial equivalent of a benefit calculated as if he worked for the employer for forty-three years.

The *Tilley* and *Blessitt* decisions are at odds with the PBGC's and the IRS's interpretation of the termination provisions of ERISA. Subsequent to the appellate decisions in *Tilley* and *Blessitt*, the PBGC issued an opinion letter stating:

> Section 4044(a)(6) . . . does not require the allocation of assets to pay benefits that might have accrued in the future if the Plans had not terminated and the participants had continued performing covered service.

PBGC Opinion Letter 87-11, *supra* p. 3. The IRS temporarily suspended issuance of determination letters with respect to plan terminations in the Fourth and Eleventh Circuits until it could review the *Tilley* and *Blessitt* decisions. *See Plan Terminations on Hold in Fourth, Eleventh Circuits*, 14 Pens. Rep. (BNA)

4 The Eleventh Circuit heard oral argument on the rehearing on February 23, 1988 and has not yet issued a decision.

1107 (Aug. 24, 1987). The IRS subsequently issued a General Counsel Memorandum in which it stated that "benefit expectations" are not liabilities which must be satisfied prior to reversion of assets and recommended that the IRS not follow the *Blessitt* decision. IRS Gen. Couns. Mem., *supra* p. 3, at 4-5.

The PBGC and the IRS are the government agencies charged with the administration of plan terminations. Their opinions, therefore, are entitled to great deference and should be followed where, as here, they are consistent with Congressional intent. *Bob Jones University* v. *United States*, 461 U.S. 574, 596-97 (1983); *Nachman Corp.*, 446 U.S. at 373-74. *See Belland* v. *PBGC*, 726 F.2d 839, 843 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984) (PBGC's interpretation of ERISA entitled to great deference); *Connolly* v. *PBGC*, 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979) (PBGC's opinion entitled to great deference in the construction and application of ERISA).

For plans in the Fourth and Eleventh Circuits and any other circuits which may follow the *Tilley* and *Blessitt* decisions, the PBGC's and the IRS's approval of plan terminations will provide little assurance for plan administrators and sponsoring employers that employees will not challenge a plan's allocation of assets and reversion of assets to the employer. Plans will be forced to choose between giving employees unearned benefits or risking suit. Plans with participants in more than one circuit may be subject to contrary interpretations of the law. The administration of terminating plans will be confused and inconsistent and will result in costly and protracted litigation. The resulting confusion will lead to uncertainty in business transactions, such as mergers and acquisitions, in which pension plan assets often are a significant factor.

B. The Fourth Circuit's Decision Casts Doubt on the Legality of Thousands of Terminated Plans

More than 50,000 defined benefit pension plans have terminated since the PBGC was established in 1974. PBGC Brief, *supra* p. 3, at 4. According to the PBGC, most of those plans

included some type of early retirement benefit. *Id.*[5] The Fourth Circuit's opinion casts doubt on, and invites challenges to, the legality of the distributions of billions of dollars from most of the plans that have terminated since 1974. In the past year, class actions have been filed in both the Fourth and Eleventh Circuits by employees seeking payment of unearned "benefit expectations" not distributed when overfunded plans terminated.[6]

To re-examine almost 50,000 plan terminations, recapture the reversions, locate thousands of former plan participants or

5 Prior to 1984, pension plans rarely provided for the payment of early retirement benefits to participants who had not satisfied all of the conditions for those benefits as of the date of plan termination. REA amended ERISA to require plans that terminate on or after July 30, 1984, to provide for payment of early retirement benefits to participants who, after the date of termination, meet the conditions for such benefits. REA § 301(a), *amending* ERISA § 204(g), 29 U.S.C. § 1054(g), and IRC § 411(d)(6), 26 U.S.C. 411(d)(6). This amendment does not apply to the Mead Plan's termination, which occurred prior to July 30, 1984.

6 *See, e.g.*, *Simpson* v. *Am. Express Co.*, No. 88-6062 (S.D. Fla. filed Feb. 1, 1988) (20,000+ members); *Franklin* v. *United States Sugar Corp.*, No. 88-12002 (S.D. Fla. filed Jan. 5, 1988) (2,500+ members); *Charleston Nat'l Bank* v. *Heck's Inc.*, No. 87-0173 (Bankr. S.D. W. Va. filed Sept. 23, 1987) (5,300+ members); *Linkous* v. *Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987) (400+ members). Under Section 413 of ERISA, the statute of limitations for actions brought under Title I for breach of fiduciary duty is either six years from the date of the action constituting a breach or from the last date such breach could have been cured or three years from when the plaintiff had or reasonably could be expected to have knowledge of the breach. 29 U.S.C. § 1113. For actions under Title IV, Section 4303 provides that suits may be brought within six years from the date on which the cause of action arose or three years from the date plaintiff acquired actual knowledge of the existence of a cause of action. *Id.* § 1453. ERISA does not provide a statute of limitations for actions for benefits, therefore, state statutes of limitations apply. *See, e.g.*, *Miles* v. *New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Jenkins* v. *Local 705 Int'l Bhd of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). Consequently, litigation may arise with respect to many of the thousands of terminated defined benefit pension plans.

their heirs and recalculate benefits would result in massive confusion, a tremendous amount of litigation, and an administrative nightmare for the PBGC and the IRS. This re-examination would cost the sponsoring employers, plan administrators and, most important, the participants and beneficiaries, a tremendous amount of money. The Supreme Court should hear and decide this issue to eliminate the confusion that will result from the opposing interpretations of the government agencies and the Fourth and Eleventh Circuits and to avoid potential different interpretations of other courts.

C. The Fourth Circuit's Decision Gives Participants a Windfall Not Intended by Congress

The Fourth Circuit held that assets should be allocated to meet participants "benefit expectations." The Fourth Circuit, however, failed to recognize that participants reasonably can expect to receive only those benefits to which they are entitled under the terms of the pension plan. One of Congress' primary purposes in enacting ERISA was to prevent the loss of vested benefits when pension plans terminated.[7] Congress found that

7 *See, e.g.*, the following statement of Senator Williams, a sponsor of the Senate version of ERISA:

> [A] basic goal [of the Senate version] is to assure workers that they will receive the promised pension benefits earned for their retirement during their working lives.
>
> * * *
>
> For too long and for too many workers, the promise of pension benefits upon retirement has been an illusion and indeed, a hoax.
>
> While there can be no doubt that our private pension system has well served the needs of many workers, our study found that for countless others, the expectation of retirement benefits has proven to be built on sand.
>
> This was the experience, for example, of Stephen Duane, who worked for 32 years at an A. & P. warehouse in Jersey City.
>
> Because this warehouse was shutdown [sic] when Mr. Duane was 4 years short of the company's minimum pension age, he received no retirement benefits whatever despite his long years of service.
>
> * * *

(*footnote cont'd on following page*)

the termination of plans before requisite funds have been accumulated deprived employees of anticipated benefits. ERISA § 2(a), 29 U.S.C. § 1001(a). "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.*, 446 U.S. at 375.

Congress intended to allocate to participants of terminating plans only those benefits which they have earned during their years of service with employers and which they reasonably expect to receive in return for that service. To hold that "benefit expectations" includes unaccrued benefits for which participants have not provided any services is to give participants a windfall not intended by Congress.

D. The Fourth Circuit's Decision Discourages the Establishment and Secure Funding of Defined Benefit Pension Plans and the Provision of Early Retirement Benefits

By effectively eliminating asset reversions, the Fourth Circuit's decision discourages the establishment of defined benefit pension plans. In defined benefit plans, the employer assumes responsibility for funding the plan sufficiently to pay benefits as they become due. Defined contribution plans do not promise stated benefits. Instead, the employer contributes an amount specified in the plan for each participant. Participants share in any investment gains of the plan and bear all investment losses. Each participant's accrued benefit equals his share of the em-

(footnote cont'd from previous page)

Indeed, two-thirds of all pension plan participants at this moment have no vested right in their plan.

As a result, losses of pension expectations can befall employees in wholesale fashion.

Senate Floor Debate on S. 4, 2 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (hereinafter cited as "Legislative History") 1579, 1599 (1976). *See also* S. Rep. No. 383, 93d Cong., 1st Sess. 78 (1973), *reprinted in* 1 Legislative History 1063, 1146.

ployer's contribution, plus or minus the investment experience of the plan.

To permit ERISA to be construed to allow participants in a defined benefit plan to receive unaccrued benefits would thwart the purpose of defined benefit plans. If employers maintaining such plans must pay benefits in excess of those defined in the plan, they will have no incentive to establish defined benefit plans and assume the risk inherent in funding the plan. Instead, they will establish defined contribution plans and place the investment risk on the participants.

For those employers who may accept the risk of establishing defined benefit pension plans, the Fourth Circuit's decision may discourage them from providing early retirement benefits. The employers avoid the possibility that they may be required to pay substantial unearned early retirement benefits upon termination of the plan. Thus, the Fourth Circuit's decision would affect adversely the participants Congress intended ERISA to protect. *See* ERISA § 2(c), 29 U.S.C. § 1001(c).

The Fourth Circuit's decision also provides a disincentive for employers to fund in advance future accruals and liabilities, effectively undermining ERISA's policy to protect pension benefits. If plans are required to pay "benefit expectations," there probably will be no residual assets to revert to employers. Employers may be encouraged to use actuarial methods and assumptions so as to provide only the minimum funding required by law. Plans will be funded less securely, threatening the stability of the plan termination insurance system.

II

THE FOURTH CIRCUIT INCORRECTLY INTERPRETED SECTION 4044(a) OF ERISA TO REQUIRE A TERMINATING PLAN TO ALLOCATE ASSETS FOR UNACCRUED EARLY RETIREMENT BENEFITS

A. The Legislative History of ERISA Supports the Conclusion that Section 4044(a) Does Not Require a Terminating Plan to Allocate Assets for Unaccrued Early Retirement Benefits

Section 4041(b)(3)(A) of ERISA requires the plan administrator of a terminating single-employer pension plan to distribute the assets of the plan in accordance with Section 4044 of ERISA. 29 U.S.C. § 1341(b)(3)(A). Section 4044(a) provides for the allocation of plan assets among six categories of benefits in a specified priority. 29 U.S.C. § 1344(a).[8]

---

8 Section 4044(a) provides:

> In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to pay benefits) among the participants and beneficiaries of the plan in the following order:
>
> (1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.
>
> (2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.
>
> (3) Third, in the case of benefits payable as an annuity—
>
> (A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,
>
> (B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

Plan assets are to be allocated in succession: If assets exceed the benefits in the first category, they are applied to the second, and so on. Any residual assets remaining after satisfaction of all liabilities to participants and beneficiaries may be distributed to the employer if the plan provides for such a distribution. ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1).

The Fourth Circuit held that Section 4044(a)(6) ("Category 6") requires a plan to allocate assets to unaccrued early retirement benefits. Relying on dictum in *Amato*,[9] the Fourth Circuit concluded that the language of Section 4044(a)(6), "all other benefits of the plan," was not limited to accrued benefits.

The *Amato* court stated that the appellants, participants of a defined benefit pension plan, would be entitled, upon partial termination of the plan, to early retirement benefits regardless whether such benefits were accrued, because Category 6 pro-

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> For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.
>
> (4) Fourth—
>
> (A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022B(a)), and
>
> (B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(5) did not apply.
>
> For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.
>
> (5) Fifth, to all other nonforfeitable benefits under the plan.
>
> (6) Sixth, to all other benefits under the plan.

29 U.S.C. § 1344(a).

9 In *Amato*, plan participants asserted, *inter alia*, that a plan amendment which reduced early retirement benefits caused a partial termination of the plan. The Second Circuit, in reviewing the dismissal of certain counts of the complaint by the district court, remanded the case to the district court for a determination of whether a partial termination had occurred under the tax law. The Second Circuit noted, in dictum, that if a partial termination had occurred, participants would be entitled under Section 4044(a)(6) to unaccrued early retirement benefits. 773 F.2d at 1415-16.

vides for allocation of "all other benefits under the plan," not "all other *accrued* benefits." 773 F.2d at 1415 (emphasis added). In a perfunctory review of Section 4044(a)'s legislative history, the Second Circuit focused only on the omission of the word "accrued" from Category 6 and incorrectly interpreted that omission as Congress' intent to include unaccrued benefits in that category.

The legislative history of ERISA reveals that while Congress intended to allocate assets to ancillary benefits which were "unaccruable," it did not intend to allocate assets to accruable benefits which had not yet accrued. The distinction between unaccruable ancillary benefits and unaccrued accruable benefits is crucial and one which the *Amato* court failed to recognize.

In the case of a defined benefit plan, the term "accrued benefit" is defined as "the individual's accrued benefit determined under the plan and, . . . expressed in the form of an annual benefit commencing at normal age, ..." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). Congress provided some guidance as to what this definition means:

> In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately.

H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 2 Legislative History, *supra* p. 8 n.7, 3115, 3180. The IRS makes the same distinction between accrued benefits and ancillary benefits:

> [A]ccrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit . . . life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h).

26 C.F.R. § 1.4111(a)-7(a)(1).

By definition, benefits which can be accrued are "accruable." "Unaccruable" or ancillary benefits are those benefits provided under the terms of the plan which do not meet the definition of accrued benefits. "Unaccrued" benefits are accruable benefits not yet earned or accrued.

Section 4044(a) as enacted is a combination of the allocation provisions of the House and Senate versions of ERISA, neither of which required the allocation of plan assets to unaccrued benefits.[10] The House and Senate versions of ERISA were consistent with pre-ERISA law, which required a plan to provide only benefits "accrued up to the time of termination." Rev. Rul. 71-152, 1971-1 C.B. 126, *revoked and restated by* Rev. Rul. 83-52, 1983-1 C.B. 87 (restating the same position after the passage of ERISA), *superseded by* Rev. Rul. 85-6, 1985-1 C.B. 133 (restating the same position after the passage of REA).

The Senate bill set forth four categories of benefits to which assets should be allocated in succession: (1) voluntary employee contributions, (2) mandatory employee contributions, (3) benefits in pay status at least three years, and (4) all other guaranteed benefits. H.R. 2, as passed by the Senate on March 4, 1974, 93d Cong., 2d Sess. § 444 (1974), *reprinted in* 3 Legislative History, *supra* p. 8 n.7, 3720-22.

The House version had seven categories of benefits, the first three of which included those benefits covered by the Senate version plus all other nonforfeitable benefits. The fourth category of the House version provided for other accrued benefits, the fifth category included interest on employee contributions, and the sixth and seventh categories consisted of certain ancillary benefits, such as any liabilities payable under the terms of the plan only upon termination and other benefits as provided

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10 One category of benefits under the House version provided for the allocation of assets to interest on employee contributions. This category was enacted separately as ERISA § 4044(d)(2).

under the terms of the plan. H.R. 2, as passed by the House on March 6, 1974, 93d Cong., 2d Sess. § 112 (1974), *reprinted in* 3 Legislative History, *supra* p. 8 n.7, 3956-61. *See* H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 375 (1974), *reprinted in* 3 Legislative History, *supra* p. 8 n.7, 4277, 4642 (hereinafter cited as "Committee Report").[11]

The Conference Committee version of the allocation provision, which ultimately was enacted, combined into six categories the priority categories of the House and Senate versions. *See* Committee Report, *supra*, at 375, *reprinted in* 3 Legislative History, *supra* p. 8 n.7, at 4642. In its opinion in *Amato*, the Second Circuit concluded that the Conference Committee, by omitting the word "accrued" from Category 6, meant to include unaccrued benefits in that category. Citing the Committee Report, the *Amato* court stated:

> The House version of the bill included among the benefits for which funds had to be allocated a category entitled "other accrued benefits." The Conference rejected this version and substituted "all other benefits under the Plan", the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

773 F.2d at 1416 (citation omitted).

Contrary to the Second Circuit's opinion, the Conference Committee did not "reject" the House version with its category "other accrued benefits." Instead, the Conference Committee combined the benefits in the fourth (other accrued benefits), sixth (plan termination benefits) and seventh (other ancillary benefits) categories of the House version into Category 6, "all other benefits under the plan." The Conference Committee did not use the term "accrued" because Category 6 includes not

11 If the plan did not specifically provide for distribution of remaining assets, the seventh category of the House version required such assets to be distributed pro rata to those persons entitled to receive a distribution under the first six categories.

only the accrued benefits of the fourth category of the House version but the ancillary benefits of the sixth and seventh categories. The Second Circuit failed to recognize that, by omitting the word "accrued," the Conference Committee followed the intent of the House and Senate versions to limit benefits received on plan termination to those benefits earned under the terms of the plan. Category 6 was not meant to, and does not, include unaccrued accruable benefits.

Not only is the Second Circuit's interpretation of the omission of the term "accrued" incorrect, it violates a basic rule of statutory construction. Unexplained changes made in committee are not reliable indicators of legislative intent. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 474 (11th Cir. 1984). In the Committee Report, the Conference Committee discussed fully those areas in which ERISA altered prior law or where the final version of the statute differed from predecessor bills.[12] Nowhere in its report does the Conference Committee state that Section 4044(a) expanded a terminated plan's liabilities beyond those required by pre-ERISA law, or that the Conference bill added unaccrued benefits, which had not been included in either the House or Senate versions, to Category 6. Such a drastic change in the law would have merited some discussion in the Committee Report or the remainder of ERISA's voluminous legislative history.

The *Amato* court also cited the PBGC regulation in support of its interpretation of Section 4044(a). The regulation states:

> The benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable.

29 C.F.R. § 2618.16. In the preamble to the proposed version of its regulation, the PBGC explained that Category 6 "con-

12 *See, e.g.*, the discussions of vesting, Committee Report, *supra*, p. 14, at 268-82, *reprinted in* 3 Legislative History, *supra* p. 8 n.7, at 4535-49, prohibited transactions, *id.*, *supra* p. 14, at 306-23, *reprinted in* 3 Legislative History, *supra* p. 8 n.7, at 4573-90, and salary reduction plans, *id.*, *supra* p. 14, at 355-56, *reprinted in* 3 Legislative History, *supra* p. 8 n.7, at 4622-23. The Legislative History contains more than 5,000 pages.

tains all plan benefits with respect to a participant not assigned to priority categories 1 through 5. Thus, priority category 6 will contain the value of accrued forfeitable benefits of a participant." Preamble to Allocation of Assets: Proposed Determination of Payable Benefits, 40 Fed. Reg. 51,368, 51,370 (Nov. 4, 1975). The *Amato* court reasoned that because the PBGC did not state explicitly that Category 6 included only accrued benefits, those benefits were merely "among" the benefits in Category 6. 773 F.2d at 1414. The PBGC, however, has never interpreted Section 4044(a)(6) or its regulation to require terminating plans to pay unaccrued benefits. *See* PBGC Brief, *supra* p. 3, at 12-13 and n.10; PBGC Opinion Letter 87-11, *supra* p. 3; PBGC Opinion Letter 86-1, *supra* p. 3.

There is a dearth of analysis in the *Tilley* opinion with respect to the legislative history and the PBGC regulation.[13] To support its holding that Section 4044(a)(6) requires the Mead Plan to pay respondents' unaccrued early retirement benefits, the Fourth Circuit seems to have relied completely on the Second Circuit's analysis of Section 4044(a) in *Amato*. Because the Fourth Circuit's decision in *Tilley* is based on the Second Circuit's erroneous interpretation of Section 4044(a)(6), it should be reversed.

B. Section 4044(a) Does Not Create Any Substantive Rights to Unaccrued Early Retirement Benefits

Section 4044 was enacted primarily "[t]o protect against evasion of the . . . limits on [PBGC] insurance benefits by use of pension fund assets to first pay uninsured benefits." S. Rep. No. 383, 93d Cong., 1st Sess. 84 (1973), *reprinted in* 1 Legislative History, *supra* p. 8 n.7, 1063, 1152. Section 4044(a) is merely a marshalling provision which ensures that plan assets are used first to pay benefits insured by the PBGC under Section 4022 of ERISA.

Section 4044(a) does not create any substantive right to benefits; it does not entitle participants to receive benefits not provided under the express terms of the plan or under ERISA. At the time the Mead Plan terminated, the respondents had not satisfied the requirements under the Mead Plan for unreduced early retirement benefits. Section 4044(a) does not entitle them to such benefits. *See* 29 C.F.R. § 2613.5(a)(3).

13 The Fourth Circuit incorrectly attributed the regulation to the Treasury Department. 815 F.2d at 992.

C. The Legislative History of the Retirement Equity Act of 1984 Further Supports Petitioner's Interpretation of Section 4044(a)

Congress has amended ERISA several times since 1974. These amendments have continued to permit asset reversions to employers while generally providing more protection for participants of private pension plans and imposing additional obligations upon employers that terminate such plans.[14]

REA was intended to strengthen ERISA's protection of retirement benefits. S. Rep. No. 575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547 (hereinafter cited as "Senate Report"). REA specifically provides that accrued early retirement benefits cannot be reduced by plan amendment or eliminated by plan termination. ERISA § 204(g), 29 U.S.C. § 1054(g). When a plan is terminated under circumstances in which employment with the plan sponsor continues, REA provides participants the opportunity to earn early retirement benefits after the termination date. Participants, however, receive the early retirement benefits only upon fulfilling the requirements for those benefits under the plan. Senate Report, *supra*, at 28, 31, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 2574-75, 2577.

Under REA, if a participant's employment is severed before the participant has met the plan's service and age requirements for unreduced early retirement benefits, the participant will be

14 *See* REA, *supra* n.3; Single Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 222 (1986); Tax Reform Act of 1986, Pub. L. No. 99-514, § 1132(a), 100 Stat. 2936 (1986); Pension Protection Act, enacted as Title IX, Subtitle D, Part II of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

unable to fulfill those requirements and will not be entitled to those benefits. *Id.*, *supra* p. 17, at 29, *reprinted in* 1984 U.S. Code Cong. & Ad. News at 2575. If REA had been in effect at the time of the Mead Plan termination and if respondents had continued to be employed by Mead, the five respondents who had met the service, but not the age, requirement for the unreduced early retirement benefit at the time of termination would be entitled to receive the early retirement benefit when they reached age sixty-two.

Congress intended REA to further protect participants' benefits. The Fourth Circuit's decision, which gives respondents greater benefits than those they would be entitled to under REA, cannot be correct unless REA, in fact, reduced participants' rights. If, as the Fourth Circuit concluded, the law in effect prior to REA required terminating plans to pay *unearned* early retirement benefits at termination, Congress would not have found it necessary to provide, through REA, for the payment of future *earned* early retirement benefits. *See* IRS Gen. Couns. Mem., *supra* p. 3, at 4.

CONCLUSION

Based on the foregoing reasons, this Court should review and reverse the decision of the Fourth Circuit and hold that ERISA Section 4044(a) does not require a terminating defined benefit pension plan to pay unaccrued early retirement benefits prior to a reversion of assets to the sponsoring employer.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(4)

NO. 87-1868

IN THE

Supreme Court of the United States

October Term, 1987

THE MEAD CORPORATION,

Petitioner

v.

B.E. TILLEY, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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21pp

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The American Academy of Actuaries submits this brief, amicus curiae, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of petitioner in No. 87-1868, having obtained the written consent of both the petitioner and the respondents to file same. A copy of said written consent is attached as Appendix 1 to this brief.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The American Academy of Actuaries (the "Academy") is a national professional organization of actuaries which was form-

ed in 1965 to bring into one organization actuaries of all specialties within the United States, and to seek accreditation and greater public recognition for the profession. The Academy serves the entire profession. Its main focus is the social, economic, and public policy environment in which the actuarial profession functions. Primary activities include liaison with federal and state governments, relations with other professions, the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice.

In order to join the Academy, prospective members must satisfy rigorous education and experience requirements. The current membership is in excess of 8600. The Academy estimates that almost 90% of those who could join have joined the Academy.

Actuaries are an indispensable element in the functioning of pension plans, particularly in areas of plan design, administration, and financing. Actuaries must satisfy regulatory requirements propounded by the Joint Board for the Enrollment of Actuaries, pursuant to Section 3042 of the Employee Retirement Income Security Act ("ERISA") in order to engage in practice pursuant to that statute (to become "enrolled actuaries"). More than 85% of all enrolled actuaries are represented within the Academy's membership.

Enrolled actuaries are authorized to make annual certifications required by Section 103(a)(4) of ERISA and, most importantly for the instant matter, to certify the minimum funding level of defined benefit pension plans under Section 302 of ERISA.

The Academy is deeply concerned about the effect of the Fourth Circuit's decision below upon defined benefit plans, upon the pension system as a whole, and upon the actuarial

profession's ability to undertake its responsibilities under law. Because of the importance of clarifying the role of actuaries in future pension plan administration, the Academy respectfully prays that the petition for certiorari filed by The Mead Corporation ("Mead" herein) be granted.

II. STATEMENT OF THE ISSUE

Whether upon termination of a defined benefit pension plan, early retirement benefits that have not accrued because the age and service conditions defined in the plan have not been met must, nevertheless, be paid to plan participants pursuant to 29 U.S.C. 1344(a)(6) before excess plan assets can revert to the plan sponsor.

III. STATEMENT OF THE CASE

Respondents in this case were six individual participants in a defined benefit pension plan which Mead terminated in 1983. The lump sum benefits paid to respondents did not include early retirement benefits. Respondents filed a Complaint against the Petitioner Mead asserting that Mead had denied them certain early retirement benefits allegedly due to them upon the plan's termination. The District Court granted Mead's motion for summary judgment, holding that the Respondents were not entitled to those benefits because they had not satisfied the age and service conditions contained in the plan as of the date of plan termination.

Respondents appealed, and a panel of the United States Circuit Court of Appeals for the Fourth Circuit reversed the district court and held that under 29 U.S.C. Section 1344(a)(6), Mead was required to pay the contested early retirement benefits, even though it is undisputed that the Respondents had not satisfied the conditions for entitlement to such benefits

as of the time of plan termination. The panel further ruled that these contested benefits were to be paid in a lump sum based on benefits payable at an early retirement age, and that such sums had to be paid before the plan sponsor could receive any residual plan assets. A motion for Rehearing *en banc* was subsequently denied, and Mead filed its Petition for Certiorari.

IV. ARGUMENT

A. INTRODUCTION AND SUMMARY

ERISA is a federal statute of significant importance to the economy. The decision of the United States Court of Appeals for the Fourth Circuit below contravenes the spirit and intent of ERISA, and could seriously undermine the stability of the private pension system. Further, it effectively creates a new class of pension benefits, previously unimagined, that may call into question the legality of thousands of prior plan terminations. The decision is ambiguous with respect to how payment of these new entitlements is to be calculated, and thereby assures excessive and costly litigation in the future. Finally, the decision conflicts with the uniform interpretation of the administrative agencies charged with enforcement of ERISA and the legislative history of ERISA.

B. THE DECISION BELOW CONTRAVENES THE SPIRIT OF ERISA AND COULD SERIOUSLY UNDERMINE THE STABILITY OF THE PRIVATE PENSION SYSTEM

1. The decision below held that early retirement benefits, although forfeitable and unaccrued, must be paid upon termination of a defined benefit pension plan. Such a decision, if allowed

to stand, could drastically affect the soundness of the nation's private pension system and undermine the purposes of ERISA. ERISA was intended to remedy defects in the private retirement system. One especially troublesome area was pension plan funding. As the Senate Committee on Finance observed in 1974, "A significant number of pension plans are not adequately funded — that is, they are not accumulating sufficient assets to pay benefits in the future to covered employees."[1] As discussed further below, the effect of the Fourth Circuit's decision below will reduce the funding level of pension plans, a result contrary to the core purpose of ERISA.

2. The court below construed ERISA Section 4044 (a)(6), 29 U.S.C. Section 1344(a)(6),[2] so-called "category 6 benefits," as applying to early retirement benefits at issue here. In so doing, the court relied upon *dicta* in *Amato v. Western Union*, 773 F.2d 1402 (2d. Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1987) which indicated that "category 6 benefits" include "benefit expectations" that must be paid before any assets could revert to the pension plan sponsor.

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[1]H.R. Rep. No. 807, 93rd Cong. 2d Sess. 23, 75, *reprinted in* 1974 U.S. Code Cong. & Admin. News, 4679.

[2]The statute reads in relevant part:

> "In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> . . .
>
> (5) Fifth, to all other nonforfeitable benefits under the plan
> (6) Sixth, to all other benefits under the plan"

In this context, it is critical to note that Section 4044(a) is a marshalling provision, which merely sets forth the order in which available funds are to be allocated at the time of plan termination. That Section does not, therefore, create any substantive entitlements to any portion of the assets themselves at the time of plan termination.

3. In plan termination situations, pension plan actuaries and administrators have rarely, if ever, interpreted category 6 benefits to include unaccrued benefits.[3] Indeed in the instant matter, at the time of the plan's creation, it is entirely unlikely that the plan sponsor ever intended unaccrued early retirement benefits to be payable upon plan termination. The Fourth Circuit's decision, if allowed to stand, could similarly affect the distribution of assets upon plan termination in pension plans in which it had never been considered that unaccrued early retirement benefits would be payable. Such a decision, if permitted to stand, would seriously impact plan funding, as explained below.

a. Defined benefit pension plans of the type involved in the instant matter generally allow for the reversion of assets in excess of those required to fund accrued benefits upon plan termination. Petitioner's plan and ERISA both provide for the recoupment of funds in excess of accrued benefits or charges.[4] In defined benefit pension plans, the plan sponsor assumes a risk: if investment performance or economic vagaries result in an accumulation of insufficient assets to pay for promised benefits, the plan sponsor and the Pension Benefit Guaranty Corporation (PBGC) — as the insurer of last resort — are responsible for the shortfall. If good investment performance results in a surplus, however, the sponsor may recover this excess after meeting all promised obligations, as was the case in the instant matter. Further, by requiring benefit payments beyond those accrued based on current age, salary, and length of service, the plan sponsor's loss of the investment risk/reward tradeoff reduces the sponsor's interest in long-run maximization of investment results. Other sponsors are likely to become increasingly conservative in their investment strategies, in turn increasing the long-term cost of all plans, and reducing amounts available to pay benefits.

[3]An exception to this general observation naturally exists for unaccrued benefits which by the terms of the plan document are expressly payable upon plan termination. *See*, Petitioner's Petition at ft.48.

[4]Art. VIII Sec. 4(f), of Mead's Plan, Petitioner's App. E at 23a; ERISA Sec. 4044(d)(1), 29 U.S.C. Sec. 1344(d)(1) (as in effect in 1984).

b. Annual contributions to a defined benefit plan, as in the instant case, require a delicate balancing of projections of many economic factors: anticipated benefits, contribution levels, investment return, and myriad others.

We believe that the Fourth Circuit below misunderstood the essential difference between defined benefit plans and defined contribution plans in reaching its judgment. In a defined benefit plan, the plan is generally funded on a projected benefit basis, that is, an amount which the sponsor, in consultation with the plan actuary, establishes as a goal for the participant at retirement. This projection takes into account expected salary increases and estimates of investment returns, inflation, mortality, and morbidity. By requiring benefit accrual beyond the amount earned by current age, salary, and years of service, the decision of the Fourth Circuit below in effect grants (and actually guarantees) continued employment credit to the participant for pension benefit purposes without requiring employment itself. This *de facto* extension of employment is beyond anything contemplated by the terms of the pension plan.

The impact of a judicial mandate to pay out unaccrued benefits on the delicate balance of actuarial projections becomes particularly apparent when one understands that a wide range

of permissible contribution levels is available to plan sponsors, falling between a minimum funding level prescribed by I.R.C. Section 412 to the maximum contribution level prescribed by I.R.C. Section 415 as permitted by the actuarial funding method selected.[5] This range of permissible contribution levels means that a plan sponsor may choose to contribute various amounts based upon his expectations of future costs and trends, as well as upon alternative business uses of his contribution capital.

If permitted to stand, the decision below may have some or all of the following negative effects on pension plans:

(1) Sponsors will attempt to select the permissible cost method which requires the lowest current year cost. This, in turn, will delay adequate plan funding into future years, then causing a greater financial burden on the plan. It is unlikely that sponsors will want to contribute anything once plan assets reach the level of accrued benefits.

(2) Benefit formulae will be restructured to protect the plan from accumulating asset balances beyond the level of accrued benefits. For example, such formulae may shift from those based on final pay (often most beneficial to plan participants) to those based on career average earnings. In order to maintain benefit adequacy during retirement, benefit increases (not required by law) may become necessary, although not necessarily available.

[5]Although the Pension Protection Act of 1987 reduced the range of permitted funding levels, it is still important to encourage the highest levels of permitted funding in order to protect plan participants and the PBGC.

(3) Subsidized early retirement benefits may well be eliminated, so that the funding of the plan will be more predictable.

It is important that the legal system operate to provide sponsors with significant incentives to adopt financially sound funding levels. This is necessary to ensure, from a conservative perspective, that all promised benefits will in fact be paid. The decision below does considerable violence to this principle.

Pension plan funding may become chaotic if the federal courts, in interpreting ERISA, create new classes of benefits not envisioned nor accounted for by the original terms, or actuarial underpinnings, of the plan. Should the decision below stand, plan sponsors will be reluctant to fund their plans at levels higher than the bare minimum required by law because of their justifiable fear that any surplus funds remaining upon termination will be disbursed to the plan participants, rather than recouped by the plan sponsor.

c. Plan sponsor hesitation to fund plans at appropriate levels will lead to the general underfunding of those plans. Such underfunding would place additional stress on the financial stability and capability of the PBGC which presently labors under a deficit in excess of $4 billion.

d. One rather bizarre result of the decision of the Fourth Circuit below is that it places employees who participate in a plan at the time of plan termination in a more favorable status than employees who had left employment or retired from the plan prior to plan termination. It has long been held and understood that a plan participant is entitled to the vested accrued benefit at termination of employment. Obviously, this means that if employees are 100% vested in the benefit at the time of retirement, they receive their accrued benefits under the terms of the plan. A retiring employee from an ongoing plan can thus never receive more than the accrued benefit.

However, pursuant to the decision of the Fourth Circuit below, a plan participant who is fortunate enough to be employed at the time of a plan termination obtains the right to benefits in excess of the accrued benefit. We can find no legal nor policy justification for discriminating against employees who retire from ongoing plans.

e. The decision of the court below, if allowed to stand, will thus weaken the stability of the private pension system. This erosion of the strength of the system runs counter to the intent of ERISA — to increase the benefit security of private pension plan participants.

C. THE DECISION OF THE COURT BELOW CREATES NEW, UNANTICIPATED LIABILITIES FOR PENSION PLANS, AND BRINGS INTO QUESTION THE LEGALITY OF PAST TERMINATIONS IN WHICH ASSETS REVERTED TO THE PLAN SPONSOR

1. The decision below, if allowed to stand, may result in challenges to the legality of past defined benefit pension plan terminations where excess assets were recovered by the plan sponsor. The instant decision has already created a plethora of litigation in the Fourth Circuit; *see, e.g., Charleston National Bank v. Hechts Inc., U.S. Bankruptcy Ct.*, S.D. W. VA (No. 87-0173); *Linkous v. Mead Corp.*, W.D. VA (No. 87-C165-R, April 24, 1987).[6]

2. In addition, on August 20, 1987, the IRS temporarily suspended approval of defined benefit plan terminations in the Fourth Circuit, in which plan assets may revert to the plan sponsor.[7] Consequently, millions of dollars of employee benefits were being held pending an IRS review of the problem.

[6]In *Linkous*, former employees of Petitioner's Lynchburg Foundry plant brought a class action suit requesting early retirement benefits of the type sanctioned by the Fourth Circuit panel below.

3. In 1986 the PBGC became aware of the termination of more than 6,800 pension plans involving over 800,000 employees. Since the PBGC was created in 1974, over 50,000 insured plans have terminated.[8] Many other uninsured plans have terminated which are also governed by the requirements of Section 4044 of ERISA. This situation raises the spectre of a flood of litigation on this issue. The cost of such litigation alone will severely impact the stability of the private pension system.

D. THE DECISION BELOW FAILS TO PROVIDE GUIDELINES CONCERNING ENTITLEMENT AND ALLOCATION OF UNACCRUED EARLY RETIREMENT BENEFITS, AND COULD LEAD TO EXCESSIVE LITIGATION

1. The court's ruling below, requiring the payment of benefit expectations, if read expansively, could extend to claims by any participant who might conceivably qualify for any form of unaccrued benefits. The court articulated no guidelines for defining the limits of qualification for unaccrued benefits. This raises additional issues with a significant potential for needless litigation. Such issues would include, but would not be limited to, the following:

[7]14 Pens. Rep. 1107 (BNA) (Aug. 24, 1987).

[8]PBGC's Amicus Curiae Brief in Support of [Mead's] Petition for Rehearing and Suggestion of Rehearing En Banc.

a. Within how many years of retirement age must a participant be at the time of plan termination in order to obtain early retirement benefits? One year? Five years? Twenty years?

b. Within how many years of the service requirement must a participant be at the time of plan termination in order to obtain benefits? Six months? One year? Five years?

c. Would the decision apply to other unaccrued benefits, such as plant-shut down benefits, or even unaccrued death benefits?

d. Would future salary increases need to be taken into account? If so, how many? And for whom (e.g., those closest to retirement)?

2. These questions are more than hypothetical, because they directly relate to the complex climate in which most pension plans operate, and they underscore the fact that the stability of the pension system would be undermined if the decision below is permitted to stand.

E. THE FOURTH CIRCUIT'S INTERPRETATION BELOW OF ERISA SECTION 4044 IS CONTRARY TO THE INTERPRETATIONS OF THE RESPONSIBLE ADMINISTRATIVE AGENCIES AND THE ENTIRE PENSION COMMUNITY

1. The court's decision below construes ERISA Section 4044 in a manner inconsistent with the interpretation held by the three federal agencies responsible for administering ERISA: the PBGC, the Department of Labor and the Department of the Treasury.

2. The PBGC, the federal agency responsible for administering the provisions of Title IV of ERISA, has consistently stated that unaccrued, early retirement benefits are not benefits under Section 4044(a)(6) of ERISA. In *dicta* relating to early retirement benefits and Section 4044(a)(6), the Second Circuit Court of Appeals in *Amato* relied heavily upon the absence of the phrase "accrued benefits" in the statutory language of Section 4044(a)(6) and in 29 C.F.R. 2618.16, the PBGC's regulation interpreting Section 4044(a)(6). The court ignored the preamble to the proposed regulation which clearly stated that "priority category 6 will contain the value of *accrued* forfeitable benefits of a participant." 40 Fed. Reg. 5136, 51370. The Fourth Circuit Court of Appeals, below, made the same error.

In numerous other instances the PBGC has construed Section 4044(a)(6), and the accompanying regulation 29 C.F.R. 2618.16, as limited to benefits that have actually accrued upon plan termination. PBGC Opinion Letter 86-1 (Jan. 15, 1986) construing regulation 29 C.F.R. 2619, "Lump Sums and Other Alternative Forms of Distribution in Lieu of Annuities" states clearly that "benefit entitlements under the terminated plan are calculated with reference only to each participant's service accrued up to the date of termination." *See also* PBGC Opinion Letter 85-9 (April 5, 1985) and 85-28 (December 2, 1985). These interpretations of Title IV of ERISA were entitled to considerable deference by this Court. *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 842-845 (1984); *Nachman Corp. v. PBGC*, 446 U.S. 359, 373-74 (1980).

3. The PBGC, the IRS, and the Department of Labor joined together to issue Implementation Guidelines for asset reversions arising from pension plan terminations. The Guidelines provide for the recovery of excess contributions by plan spon-

sors at the time of plan termination, following the payment of all accrued benefits. PBGC Release 84-23, May 23, 1984. The Guidelines clearly demonstrate that recovery is permissible after arrangements have been made to guarantee the participants' accrued benefits.[9]

4. The Treasury Department also has consistently held, for the past 50 years, that assets may revert to the plan sponsor. Treasury Regulation Section 1.401-2(b), explaining I.R.C. 401(a)(2), clearly states that upon "satisfaction of all liabilities [the plan sponsor] may recover at the termination of the trust, and only at such termination, any balance remaining in the trust." This language, previously Treas. Reg. 39.165-2(b) has remained virtually unchanged since 1939, as has I.R.C. 401(a)(2).

Moreover, the Treasury Department has issued a series of Revenue Rulings all of which support the pertinent language of an earlier Revenue Ruling requiring a terminated plan to provide only benefits "accrued up to the time of termination."[10] Since the creation of Section 401(a)(2) of the Code,

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[9]PBGC, IRS, and Labor Department [Implementation] Guidelines, *reprinted in* 11 Pens. Rep. 724 (BNA) (May 28, 1984). The Joint Implementation Guidelines state in part as follows:

> "1. In accordance with current law, when an employer terminates a defined benefit pension plan, it may not recover any surplus assets until it has fully vested all participants' benefits and has purchased and distributed annuity contracts, *to protect participants against the risk that their accrued benefits may be jeopardized* by future market fluctuations or other factors." (emphasis added)

[10]Rev. Rul. 71-152, 1971-1 C.B. 126. This pre-ERISA ruling was revoked by Rev. Rul. 83-52, 1983-1 C.B. 87, which restated the same principle. *See also* Rev. Rul. 80-229, 1980-2 C.B. 133 (1980) which discussed the appropriate circumstances under which asset reversion is allowed under I.R.C. Section 401(a)(4), I.R.C. Section 411(d)(2). The Ruling states that: "If the assets as of the date of termination exceed the present value of

the issue of reversions has been debated many times in the House and Senate and in every instance the final draft of the bill has permitted the reversion of excess assets.[11]

F. THE DECISION BELOW IS CONTRARY TO NUMEROUS EXPRESSIONS OF CONGRESSIONAL INTENT WHICH ALLOW FOR REVERSION OF ASSETS UPON PLAN TERMINATION AFTER ALL ACCRUED BENEFITS HAVE BEEN PAID

1. The requirement to pay benefit expectations would eliminate most opportunities for plan asset reversions, since most (if not all) excess assets would have to be paid out to plan participants for their unaccrued benefits. In effect, therefore, the decision below would by judicial fiat eliminate an element of pension policy created by Congress and accommodated by the oversight agencies.

2. Denying the sponsor a reversion of excess assets is clearly contrary to numerous expressions of Congress' policy authorizing such reversions. This policy was the subject of extensive deliberation and is based upon the sound fundamental principle that Congress sought to ensure: that plans were adequately funded. Again, as noted above, plan sponsors may make annual contributions within a range available to them under law, from a minimum funding level calculated to meet the minimum needs for benefit payments to the maximum con-

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the *accrued* benefits (whether or not forfeitable) as of such date, the plan will not be considered discriminatory if such excess reverts to the employer or is applied to increase benefits in a nondiscriminatory manner." (emphasis added)

[11]See H.R. Rep. No. 1860, 75th Cong., 2d Sess. 46-47 (1938); S. Rep. No. 1567, 75th Cong., 2d Sess. 24 (1938); H.R. Rep. No. 2586, 77th Cong., 2d Sess. 52-53 (1942).

tribution for which tax deductions are available to the plan sponsor. Funding at maximum levels assures that all benefits will be paid, and also creates the potential for benefit improvements during the lifetime of plan participants. By preventing recovery of excess assets, an incentive for plan sponsors to fund plans at maximum levels is eliminated.

The legislative history concerning Section 4044(d) attests to full and vigorous deliberation on the subject of reversions. In 1973, prior to the enactment of ERISA, hearings on proposed bills, in both the House and Senate, centered upon reversions. In all instances, the bills were passed allowing reversions upon plan termination despite initial objections rejecting such reversions.[12]

3. In 1987, the issue of reversions was again hotly contested in Congress during consideration of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 203, 100th Cong. 1st Sess. (1987) (hereinafter "OBRA 1987"). Despite stern opposition by the House Education and Labor Committee and the Senate Labor and Human Resources Committee, OBRA 1987 refused to eliminate the well-established rules allowing plan sponsors to recover excess assets. The Senate leaders commented that "the present law standards, as reflected in

[12]*Welfare and Pension Legislation: Hearings on S.4 and S.75 Before the Subcomm. on Labor of the Senate Committee on Labor and Public Welfare*, 93rd Cong., 1st Sess. 193-202 (1973) (Provided that all residual assets contributed by employees must inure to employee; bill did not disallow employer contributions to revert). *See, Welfare and Pension Legislation: Hearings on H.R. 2 and H.R. 462 before the General Subcomm. on Labor of the House Committee on Education and Labor*, 93rd Cong., 1st Sess. 125-160 (1973) [language of the bill is now contained in ERISA 4044(d)(1)]. *See also* H.R. Rep. No. 533, 93rd Cong., 1st Sess. 22 (1973)(the House Education and Labor Committee conference report on H.R. 2 as reported: "[a]ny remaining assets [after satisfaction of liabilities] would be returned to the employer if the plan so provides.")

the Implementation Guidelines, and the present-law excise tax on reversions, are appropriate rules for addressing the issue of employer access to excess plan assets."[13]

If Congress had intended to change the rules regarding acceptable instances of reversions it has had ample opportunity to do so. Instead, Congress has to date unambiguously permitted such reversions. The decision by the Fourth Circuit below clearly impinges upon the plan sponsor's right to recover excess assets it voluntarily contributed to the plan.

V. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[13]S.Rep.No. 63, 100th Cong., 1st Sess. 193 (1987).

APPENDIX 1

April 15, 1988

TO: Any interested party or organization wishing to file an amicus curiae brief in the United States Supreme Court

RE: B.E. Tilley, *et al.*, Appellants v. The Mead Corporation, Appellees Case No. 86-3858 (4th Cir. Feb. 17, 1988)

Pursuant to Rule 36.1, Rules of the Supreme Court of the United States, undersigned counsel for the parties in the above-referenced case hereby consent to the filing of amicus curiae briefs by any interested party or organization.

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AMICUS CURIAE

BRIEF

(6)

No. 87-1868

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

THE MEAD CORPORATION,
Petitioner,

v.

B.E. TILLEY, DAVID H. WALL, WILLIAM L. CROTTS, CHRISLEY H. REED, J.C. WEDDLE, WILLIAM D. GOODE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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24 pp

QUESTION PRESENTED

Whether Section 4044(a)(6) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1344(a)(6), requires the administrators of terminated defined benefit pension plans to pay plan participants amounts in excess of the benefits they have accrued under the terms of the plan as of the date of plan termination before any residual assets may revert to the employer pursuant to Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1).

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BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States government corporation established by Section 4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302. The PBGC administers the single-employer pension plan termination insurance program in Title IV of ERISA, 29 U.S.C. § 1301, *et seq.* That program covers

over 30 million participants in more than 110,000 defined benefit pension plans voluntarily established by employers in the private sector. One of the primary duties of the PBGC is to encourage the continuation and maintenance of such plans for the benefit of their participants. 29 U.S.C. § 1302(a)(1).

The PBGC is authorized and required to issue such "rules and regulations as may be necessary to carry out the purposes of [Title IV]." 29 U.S.C. § 1302(c)(3). Pursuant to this authority, the PBGC has issued regulations, at 29 C.F.R. Part 2618 (1987), interpreting Section 4044 of ERISA, 29 U.S.C. § 1344. Section 4044 is a key provision of Title IV governing the distribution of plan assets at plan termination. Subsection (a) establishes the order of priority for allocating plan assets among participants and beneficiaries. 29 U.S.C. § 1344 (a). Subsection (d)(1) permits the employer that maintained the plan before termination to recover residual assets, if any, after all liabilities of the plan have been satisfied. 29 U.S.C. § 1344(d)(1).

The United States Court of Appeals for the Fourth Circuit decided that Section 4044 includes, as liabilities that must be satisfied before an employer can recover residual plan assets, benefits not yet accrued by participants at the time of plan termination. This decision is contrary to PBGC's long-standing interpretation of Section 4044, and to the established practice of the professional pension community. It therefore jeopardizes the orderly administration of plan termination, and unsettles the past distribution of billions of dollars in terminated plan assets.[1]

[1] Less than two months after the decision of the Fourth Circuit in this case, a panel of the United States Court of Appeals for the Eleventh Circuit decided that Section 4044(a)(6) of ERISA entitles participants in terminated plans to the "unaccrued benefits to which they would have been entitled at normal retirement age" if the plan had not terminated and the participants had continued working until the normal retirement date. *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 989 (11th Cir. 1987). The full court vacated that decision and granted rehearing *en banc* on January 20, 1988. 836 F.2d 1571 (11th Cir. 1988) (*en banc*). Oral argument was heard on February 23, 1988. There has been no decision to date.

The PBGC maintains statistics on terminations that resulted in reversions of $1 million or more in calendar years 1980 through 1987. During those years, 1,635 plans terminated with assets that exceeded, by at least $1 million, the present value of benefits accrued through the date of plan termination. Almost $22 billion has been distributed to the 1.8 million employees and retirees who participated in those plans, and more than $18 billion in residual assets has reverted to their employers. As of December 31, 1987, the distribution of an additional $695 million in plan assets was in question in 54 then-pending termination cases involving potential reversions of $1 million or more. Reversions of lesser amounts obviously have resulted from the terminations of numerous other plans. The PBGC estimates, for example, that at least 4,800 of the more than 6,800 plans terminated in 1986 had assets that exceeded the present value of the benefits accrued under the plans at the time of termination.

The decision of the Fourth Circuit has created substantial uncertainty about the distribution of assets in pending cases, and, if allowed to stand, may be relied upon to require the reallocation of billions of dollars already distributed to employers and their employees pursuant to Section 4044. Plan participants in several pending cases have already asserted Section 4044 as a basis for obtaining benefits greater than those accrued under the terms of their plans as of the date of plan termination.[2] The resulting administrative and judicial task of

[2] Participants in several other pending cases have relied on the panel's decision in *Blessitt* or the Fourth Circuit's decision in this

reallocating assets to provide these additional benefit amounts will be difficult if not impossible.

Moreover, the decision of the Fourth Circuit penalizes employers that overfund their defined benefit plans, out of an abundance of caution or as a result of actuarial error, by imposing substantial unanticipated liabilities for benefits never promised to their employees. To avoid these liabilities, employers may decide not to establish new defined benefit pension plans. Congress, however, intended to encourage the continuation and maintenance of voluntary defined benefit pension plans for the benefit of their participants. 29 U.S.C. § 1302(a)(1). Contrary to this intent, the Fourth Circuit's decision induces employers to fund their existing defined benefit pension plans to the minimal extent permitted by law. Such funding practices are inimical to the long-term interests of the millions of plan participants and beneficiaries that ERISA was enacted to protect, and to the PBGC's interest in maintaining a viable pension insurance program.

case to support claims for amounts in excess of their benefits accrued to the date of plan termination. *R.H. Ashenbaugh v. Crucible, Inc. 1975 Salaried Retirement Plan, appeal pending*, No. 87-3722 (3d Cir.) (claim that Section 4044(a)(6) of ERISA is a vehicle for the award of "unaccrued benefits"); *Freeman v. CRS Sirrine, Inc. Retirement Plan and Trust*, No. 6:87-3319-3 (D.S.C. filed Dec. 16, 1987) (class action complaint alleging entitlement to "the present value of benefits promised under the plan, but not yet accrued"); *Fechter v. HMW Industries, Inc.*, No. 87-0506 (E.D. Pa. amended class action complaint filed Jan. 1988) (asserting claim for "benefits promised under the Plan but not accrued as of the date of termination"); *Great Western Sugar Co. v. Teamsters, Chauffeurs, Warehousemen and Sugar Workers Local Unions*, C.A. No. 3-85-1710-T (N.D. Tex.) (motion of Sugar Factory Workers Local Unions, Interstate Council of Sugar Workers, George Winkler and Delmar Burchette for leave to amend answer and counterclaim to assert a claim for "unaccrued forfeitable benefits" filed on Dec. 7, 1987) (motion of Fulton Defendants for leave to amend answer and counterclaim to assert claim for "unaccrued forfeitable benefits" filed Jan. 11, 1988). Additional cases raising similar claims are cited in the Petition at p. 17 n.9.

At plan termination, participants in an underfunded pension plan may lose all benefits not guaranteed under Title IV. If plan assets are insufficient to pay guaranteed benefits, the PBGC is required to pay those benefits from its insurance funds. 29 U.S.C. § 1322. Although the employer is liable to the PBGC for some or all of the unfunded guaranteed benefits, depending on the date of plan termination, the PBGC does not realize full recovery in every case. The pension insurance program therefore bears the risk of loss whenever an employer fails to fund its pension promises. The decision of the Fourth Circuit increases this risk insofar as it encourages employers to fund their defined benefit pension plans minimally.

STATEMENT OF THE CASE

Petitioner, The Mead Corporation ("Mead"), established the Mead Industrial Products Salaried Retirement Plan (the "Plan") to cover employees at the Lynchburg Foundry Company (the "Foundry"), a wholly-owned subsidiary of Mead. Respondents, B.E. Tilley, David H. Wall, William L. Crotts, Chrisley H. Reed, J.C. Weddle, and William D. Goode, are former employees of the Foundry and participants in the Plan. Although Mead expected when it established the Plan to maintain it "indefinitely" (J.A. 30)[3], the Plan was terminated on August 1, 1983, after Mead sold the Foundry to another corporation. (Pet. App. 3a.)

The Plan is a noncontributory, defined benefit plan. (Pet. App. 10a.) It provides benefits calculated with reference to a participant's age, earnings, and years of service at retirement or other termination of employment. (J.A. 322-24.) Normal retirement benefits are payable at the normal retirement age of 65. (J.A. 321.) The

[3] "J.A." refers to the Joint Appendix filed in the court of appeals. References to the appendix to the petition are cited herein as "Pet. App."

Plan also provides early retirement benefits to participants who attain age 55, calculated in the same manner as normal retirement benefits, but actuarially reduced by five percent for each year by which a participant's early retirement precedes his normal retirement date. (J.A. 321, 323.) Under Article V, Section 2 of the Plan, however, a participant who completes 30 years of service and elects to retire on or after attaining age 62 is entitled to an unreduced early retirement benefit, *i.e.*, an early retirement benefit in an amount equal to the benefit normally payable at age 65. (J.A. 323.)

Although Mead paid unreduced early retirement benefits to all employees who met both the age and service requirements on the date of plan termination, none of the respondents had attained age 62 by that date, and one had not completed 30 years of service. (Pet. App. 3a.) Accordingly, each received a lump sum payment equal to the present value, determined as of the date of distribution, of the normal form of benefit to which he was entitled under the terms of the plan at normal retirement age. (*Id.*) The $10 million that remained after the payment of these and all other benefits under the Plan reverted to Mead, pursuant to Article XIII, Section 4(f) of the Plan. (J.A. 344; Pet. App. 3a.)

In 1984, respondents filed suit in the United States District Court for the Western District of Virginia. Respondents alleged that they were entitled to unreduced early retirement benefits, notwithstanding their failure to satisfy the Plan's age and service requirements. (J.A. 1-15.) In the alternative, respondents claimed that they were entitled to a pro rata share of the residual assets that reverted to Mead. (J.A. 378.)

The district court rejected respondents' claim for unreduced early retirement benefits, deciding that "[t]he Plan's language, the legislative history, and the caselaw in the fourth circuit . . . clearly demonstrate that early

retirement benefits are not 'accrued benefits' under ERISA." (Pet. App. 11a.) "Since the Plan in question was a defined benefit plan" (Pet. App. 13a), the district court also rejected respondents' claim for a share of the residual Plan assets that had reverted to Mead. The court relied on the general rule permitting reversions after the payment of defined benefits, which, in its view, is supported by "[t]wo sound underlying policies." (*Id.*) "First, ERISA is designed to protect only those benefits which have become vested." (Pet. App. 13a.) It is "not designed to provide participants with a windfall due to the employer's error in overfunding the Plan in an attempt to keep it on a sound financial basis." (*Id.*) Second, "the rule will serve to encourage employers to keep the funds fully funded under ERISA guidelines in that they will not be penalized for overfunding in an 'abundance of caution.'" (*Id.* citations omitted.)

The Fourth Circuit reversed. Because the "application of category 6 of ERISA § 4044 [wa]s controlling" (Pet. App. 7a), the Fourth Circuit found it unnecessary to decide the question whether the unreduced early retirement benefits under the Plan in this case were accrued benefits.[4] Adopting the reasoning of the United States Court of Appeals for the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1407-14 (2d Cir.), *cert. dismissed*, 474 U.S. 1113 (1985),

[4] As the district court noted, Congress has amended ERISA to require that early retirement benefits be treated as accrued benefits in some circumstances. (J.A. 378.) Section 301(a) of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1450-52, amended Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and Section 411(d)(6) of the Internal Revenue Code, to require plans terminating after July 30, 1984, to make provision for the payment of early retirement benefits to participants who satisfy the pretermination conditions for the benefits after the date of termination. The amendment does not apply to the Plan, which terminated in 1983. (J.A. 378.) In any event, the decision of the Fourth Circuit goes beyond what REA requires.

the Fourth Circuit held that category six of Section 4044 includes early retirement benefits "even if those benefits were not accrued at the time of termination." [5]

SUMMARY OF ARGUMENT

The Fourth Circuit erred in relying on Section 4044 of ERISA to require the payment of amounts in excess of the benefits to which respondents were entitled on the date of plan termination. Benefit entitlements are governed by the accrual and vesting provisions in Titles I and II of ERISA and the terms of defined benefit plans. They are not altered or enhanced by Section 4044 at plan termination.

Plan termination stops benefit and vesting accruals and fixes the benefits of participants in defined benefit pension plans. *In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 649 (2d Cir. 1983); *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983); *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 517 (4th Cir. 1980). Section 4044 therefore merely provides for the orderly allocation of plan assets to the benefits accrued up to the time of termination. It assigns all plan benefits to one or more of six priority categories, and requires the allocation of available plan assets to each category in succession. "[A]ll . . . benefits under the plan" that are not included in categories one through five are assigned to priority category six. After all benefits in category six have been provided, Section 4044(d)(1) permits the reversion of residual assets to the employer. *Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 458 (4th Cir. 1987).

[5] Like the Fourth Circuit, the PBGC expresses no view on the question, arising under Titles I and II of ERISA, whether early retirement benefits are accrued benefits. *Compare Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir. 1985); *Sutton v. Weirton Steel Division of National Steel Corporation*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) *with Amato v. Western Union International, Inc.*, 773 F.2d at 1407-14. The United States filed an *amicus curiae* brief in *Amato*, on behalf of the Internal Revenue Service, arguing that early retirement benefits are accrued benefits within the meaning of Section 411 of the Internal Revenue Code. That brief did not address Section 4044 of ERISA or that part of the *Amato* decision on which the Fourth Circuit relied in this case. The PBGC did not participate in *Amato*, and its views in this case are limited to Section 4044.

Category six is the only category to include forfeitable benefits. It includes benefits accrued but not yet vested under the terms of a plan before plan termination. Category six, however, does not include the mere expectation of benefits not accrued on the date of plan termination, and that may never be payable under the plan. The decision of the Fourth Circuit to the contrary cannot be reconciled with the orderly administration of defined benefit pension plans or the policies underlying ERISA.

ARGUMENT

The decision below conflicts with the policies underlying ERISA, and with the PBGC's well-established construction of Section 4044. It drastically changes the rules that have been applied to administer plan terminations since ERISA was enacted in 1974. Plan administrators and actuaries have consistently relied on those rules to determine the rights of plan participants and beneficiaries, and their employers, to the assets of terminated plans. The decision of the Fourth Circuit, however, removes all certainty in this area. A definitive ruling on the question presented therefore is of immense practical importance to the administration of the pension insurance program and the pension security of the millions of American workers protected by Title IV. Consequently, review is warranted at this time.

The Fourth Circuit decided that respondents had a right under Section 4044(a)(6) of ERISA to the payment of unreduced early retirement benefits at plan termination even though respondents did not then, and

may never, meet the conditions of entitlement set forth in the Plan.[6] In the court's view, such benefits are liabilities of the Plan under Section 4044 of ERISA that must be satisfied before any residual plan assets may revert to the employer. Section 4044, however, does not create benefit entitlements in addition to those provided under the terms of a defined benefit plan or other provisions of ERISA.

Section 4044 of ERISA prescribes rules for distributing the assets of a terminated pension plan to plan participants, and, where appropriate, their employer. Section 4044(a) establishes the order of priority for allocating plan assets to the benefits of plan participants. All plan benefits are assigned to one or more of six priority categories. The plan administrator must allocate available plan assets to each category in succession, beginning with priority category one. This process is repeated until all assets are exhausted, or until all benefits in categories one through six have been provided. Residual assets, if any, may be distributed to the employer in accordance with Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1). *See* 29 C.F.R. § 2618.10 (1987).

Section 4044 of ERISA was enacted in conjunction with the PBGC's guarantee of certain nonforfeitable benefits under Section 4022 of ERISA, 29 U.S.C. § 1322. Subject to the limitations in Section 4022, the PBGC insures the payment of all nonforfeitable benefits accrued and vested under the terms of defined benefit plans at the time of plan termination.[7] The primary purpose of

[6] According to the brief of respondents in the court of appeals, respondent David H. Wall died shortly after the initiation of this action, before attaining age 62. It is unknown, moreover, whether respondent Crotts has or will meet the 30-year service requirement.

[7] Section 4001(a)(8) of ERISA defines "nonforfeitable benefit" to mean, "with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act . . . ." 29 U.S.C. § 1301(a)(8).

Section 4044 is "[t]o protect against evasion of the . . . limits on the [PBGC's] insurance by use of pension assets first to pay uninsured benefits." S. Rep. No. 383, 93d Cong., 1st Sess. 84 (1973). The nonforfeitable benefits guaranteed by the PBGC therefore are assigned to the first four priority categories. 29 U.S.C. §§ 1344(a)(1)-(a)(6). Section 4044, however, also ensures that nonforfeitable benefits will be paid before forfeitable benefits if plan assets are insufficient to pay both. It assigns nonforfeitable benefits not guaranteed by the PBGC to priority category five, which includes "all other nonforfeitable benefits under the plan," 29 U.S.C. § 1344(a)(5),[8] and "all other benefits under the plan" to priority category six. 29 U.S.C. § 1344(a)(6).

Category six is the only priority category to include forfeitable benefits. It includes the benefits accrued but not yet vested under the terms of a plan before termination that are protected at termination by Section 411(d)(3) of the Internal Revenue Code and corresponding plan provisions like Article XIII, Section 4(h) of the Plan in this case. (J.A. 375.)

As a condition for tax qualification under Section 401(a) of the Code, Section 411(d)(3) requires plans to provide that "the rights of all affected employees to benefits accrued to the date of . . . termination . . . to the extent funded as of such date . . . are nonforfeitable." 26 U.S.C. § 411(d)(3). Section 411(d)(3) thus "vest[s] certain unvested employee benefits for workers who would otherwise be left out in the cold" on plan termination. *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3d Cir. 1987). The protections of that provision, however, extend only to "benefits accrued" to the date of plan termination and

[8] The PBGC's guarantee may not fully cover certain recent benefit increases, 29 U.S.C. § 1322(b)(1), or benefits in excess of the statutory limitation. 29 U.S.C. § 1322(b)(3).

apply only to the extent that assets are available on that date. 26 U.S.C. § 411(d)(3).[9]

The PBGC has always construed Section 4044(a)(6) to include only those benefits that have accrued under the terms of a plan as of the date of plan termination. The agency's regulations under Section 4044 state that:

> The benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable.

29 C.F.R. § 2618.6. As early as 1975, the PBGC clarified in the preamble to the proposed version of the regulations that "priority category 6 will contain the value of *accrued forfeitable* benefits of a participant." 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975) (emphasis added).[10] The PBGC has consistently affirmed this view in numerous Opinion Letters addressing plan terminations, *see* PBGC Opinion Letters No. 86-5 (March 6, 1986); 86-1 (Jan. 15, 1986); 85-28 (Dec. 2, 1985); 85-9 (April 5, 1985), and in the guidelines on asset reversions that the PBGC issued jointly with the other agencies responsible for administering ERISA, the Department of Labor and the Internal Revenue Service. PBGC News Release No. 84-23 (May 23, 1984).

By its terms, Section 4044(a)(6) requires reference to the terms of the terminated plan. The Fourth Circuit has therefore recognized in other cases that "[t]he scheme established by ERISA relies upon the provisions of each plan at the time of termination." *Wilson v. Bluefield Supply Co.*, 819 F.2d at 463, *quoting Audio Fidelity Corp. v. PBGC*, 624 F.2d at 517. At the time of termination, the defined benefit plan in this case provided unreduced early retirement benefits only to participants who had completed 30 years of service and attained age 62. The Plan, moreover, does not take post-termination events into account for the purpose of determining benefit entitlements, and does not promise continued benefit accruals after termination. Instead, it promises the payment only of "benefits accrued to the date of . . . termination." (J.A. 345.)

[9] The PBGC's asset alloaction regulation logically assigns these benefits to category six, where they literally will be paid only to the extent funded. 29 C.F.R. §§ 2618.2, 2618.16 (1987).

[10] Although the text of the PBGC's regulation changed somewhat when it was issued in final form, the preamble to the final regulation clarified that the changes did not affect the substance of the regulation on this point. 46 Fed. Reg. 9485 (Jan. 28, 1981).

Category six is not a benefit accrual or vesting provision, and does not create any substantive benefit entitlements. Those entitlements are delimited by other provisions of ERISA and the terms of defined benefit plans. They are not augmented by Section 4044 at plan termination, because benefit accruals and vesting become fixed on the date of plan termination. *See In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d at 649; *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d at 201; *Audio Fidelity Corp. v. PBGC*, 624 F.2d at 517.

The Fourth Circuit's use of category six to require the payment of benefits in excess of those provided by the Plan or other applicable law cannot be reconciled with the concept of defined benefit plans under ERISA. Defined benefit plans are "designed and administered to provide fixed—or 'defined'—benefits to the participants based on a benefit formula set forth in the [p]lan." *Wilson v. Bluefield Supply Co.*, 819 F.2d at 459; *see Nachman Corp. v. PBGC*, 446 U.S. 359, 363 n.5 (1980). An employer maintaining such a plan is responsible for ensuring sufficient funding to pay the plan's defined benefit obligations when they become due. The employer's contributions thus will vary according to actuarial predictions, including assumptions regarding such variables as employee compensation, employee turnover, investment returns, and mortality. Although the employer bears the

risk of the plan's actuarial and investment experience, that experience has no effect on the defined benefit entitlements of the plan's participants.

"Residual assets, by definition, are assets in *excess* of those necessary to satisfy defined benefit obligations." *Wilson v. Bluefield Supply Co.*, 819 F.2d at 464 (emphasis in original). They are "those assets remaining in a pension plan at the time of termination after payment to the employees of all accrued benefits under the plan." *Id.* at 458; *see Chait v. Bernstein*, 835 F.2d at 1026. And, "ERISA explicitly provide[s] for the recapture of surplus assets by the employer after a pension plan has been terminated and accrued benefits have been allocated." *District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1478 (S.D.N.Y. 1983); *see In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1133 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1273, 1275 (3d Cir. 1978).

The only authority cited by the Fourth Circuit for its decision to the contrary is *Amato*. In that case, the Second Circuit concluded that category six includes "unaccrued" benefits in the form of "benefit expectations." 773 F.2d at 1415, 1416. The *Amato* court, however, misconstrued the PBGC's interpretation of Section 4044(a)(6) and relied on a conclusory and incomplete review of the legislative history of Section 4044.

The House and Senate versions of ERISA included substantially different versions of the provision that ultimately resulted after conference in Section 4044. The Senate bill required the allocation of assets only to benefits derived from mandatory and voluntary employee contributions and the other guaranteed benefits now included in categories one through four of Section 4044. H.R. 2, 93d Cong., 2d Sess. § 444 (1974) (as passed by the Senate on March 4, 1974), *reprinted in* III *Subcomm. on Labor of the Senate Committee on Labor and Public Welfare*, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at

3599, 3720-22 (Comm. Print 1976) (hereinafter "Leg. Hist."). The House bill had a more complex scheme, consisting of seven priority categories. The fourth of these included the present value of accrued benefits not payable under higher priority categories. H.R. 2, 93d Cong., 2d Sess. § 112(b)(4) (1974) (as passed by the House on February 28, 1974), *reprinted in* III *Leg. Hist.* at 3898, 3958. Assets in excess of those needed to fund the first four categories were to be allocated successively to: the assets attributable to investment earnings on employee contributions; benefits that "the plan may set forth as being payable only if the plan terminates"; and residual plan assets distributable as provided in the plan, or, if the plan had no provision for such distribution, on a pro rata basis to each person otherwise receiving a distribution under a higher priority category. *Id.* at § 112(d), *reprinted in* III *Leg. Hist.* at 3960.

The Conference Committee considered the House and Senate versions of the bill, and included in the Conference bill the allocation scheme that ultimately was enacted in Section 4044. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 234-37, 375 (1974), *reprinted in* III *Leg. Hist.* at 4504-07, 4642. Because the Conference Committee did not include the word "accrued" that appeared in the fourth category of the House bill in category six of the Conference bill, the *Amato* court concluded that "Congress . . . decided not to limit the allocation requirement to accrued benefits." 773 F.2d at 1416. The Conference Report, however, does not explain the reason, if any existed, for the omission of this word. And, it is a rudimentary principle of statutory construction that such unexplained changes made in Committee "are not reliable indicators of congressional intent." *Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984), *citing Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947). The *Amato* decision, for example, ignores other possibilities, such as the likely explanation that the Committee con-

sidered the word "accrued" to be unnecessary in Section 4044(a)(6), in light of pre-ERISA law as enacted into Section 411(d)(3) of the Internal Revenue Code.

The legislative history of Section 411(d)(3) of the Internal Revenue Code explains that:

> Under the conference substitute, as under present law, all accrued benefits in a qualified pension plan must become fully vested (in accordance with the rules of the bill concerning allocation of assets upon plan termination and to the extent then funded) in the event of a plan termination.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 277 (1974), *reprinted in* III *Leg. Hist.* at 4544. Pre-ERISA law required a terminated plan to provide only benefits "accrued up to the time of termination." Rev. Rul. 71-152, 1971-1 C.B. 126.[11] There is no language in Section 4044 of ERISA that alters this rule.

In interpreting ERISA, "courts must always bear in mind the ultimate consideration whether allowance or disallowance of the particular relief would best effectuate the underlying purposes of ERISA," including the "promotion of the best interests of participants and beneficiaries." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 158 (1985) (Brennan, J., concurring). Here, however, the Fourth Circuit ignored both the policies underlying Section 4044 and the long-term interests of participants in defined benefit plans and their beneficiaries.

Section 4044 is "clearly intended to ensure that while an employer is obligated to provide defined benefits to plan participants, the participants should not be able to

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[11] This pre-ERISA ruling was revoked by Rev. Rul. 83-52, 1983-1 C.B. 87, which restates the same principle. Rev. Rul. 83-52 was subsequently modified and superceded by Rev. Rul. 85-6, 1985-1 C.B. 133, in light of the requirements of Section 301 of REA.

claim a windfall stemming from the employer's accidental overfunding of a defined benefit plan." *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 555 F. Supp. 257, 260 (D.D.C. 1983). In fact, "[c]ommon sense dictates that employers which fund Plans under ERISA guidelines should not be penalized for overfunding in an abundance of caution or as a result of miscalculation by the actuary." *Chait v. Bernstein*, 835 F.2d at 1027, *quoting Wright v. Nimmons*, 641 F. Supp. 1391, 1407 (S.D. Tex. 1986). This is because, "[o]ver a period of time, pension plan participants in general stand to benefit more from a policy that encourages employers to fund pension plans generously than from a policy that entitles plan participants to surplus assets and thereby discourages employers from potentially excessive funding." *Eagar v. Savannah Foods & Industries, Inc.*, 605 F. Supp. 415, 420 (N.D. Ala. 1985).

Allowing reversions in accordance with valid plan provisions after payment of all defined benefits accrued under the terms of a plan thus is consistent with the policies underlying ERISA. The "employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis." *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. at 1133.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE

BRIEF

(7)

No. 87-1868

IN THE

Supreme Court of the United States

October Term, 1987

THE MEAD CORPORATION,

Petitioner

v.

B.E. TILLEY, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

The issue in this case is whether benefits not earned under the terms of a defined benefit plan must be paid to participants before surplus plan assets may revert to the employer upon termination of a single employer defined benefit plan.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Society of Pension Actuaries submits this brief, amicus curiae, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States in support of the petitioner. Counsel for the parties in this case have given written consent to the filing of amicus curiae briefs by any interested party or organization.

STATEMENT OF THE CASE

The Plaintiffs (employees) in this case were participants in a defined benefit pension plan which terminated in 1983 without providing early retirement benefits to the Plaintiffs. Plaintiffs filed a Complaint against the Defendant (employer) asserting that the Defendant denied early retirement benefits due Plain-

tiffs upon plan termination. On Motions and Cross-Motions for Summary Judgment, the District Court granted Defendant's Motion for Summary Judgment holding that Plaintiffs were not entitled to early retirement benefits because they had not satisfied the conditions for early retirement at the time the plan was terminated. Plaintiffs appealed and a panel of the Fourth Circuit Court of Appeals reversed the District Court in a decision issued on April 9, 1987. The Fourth Circuit held that under 29 U.S.C. Section 1344(a)(6), the Defendant was required to pay early retirement benefits to the Plaintiffs, even though the Plaintiffs had not satisfied the conditions for entitlement to such benefits, before the defendant was allowed to receive any residual assets. The Fourth Circuit required the calculation of the lump sum benefits payable to the Plaintiffs to be based upon their benefits payable at early retirement age. The Defendant then filed its Petition for Rehearing and Suggestion for Rehearing *en banc*, which was denied.

INTEREST OF AMICUS

The American Society of Pension Actuaries (ASPA) is a non-profit organization whose membership consists of more than 2500 persons who provide actuarial, consulting and administrative services to approximately 30% of the qualified retirement plans in the United States.

One of ASPA's primary purposes is the preservation and enhancement of the private pension system in the United States. It is our view that the decision of the Fourth Circuit Court of Appeals in the case of *Tilley v. Mead Corp.*, 815 F.2nd 989 (1987) (hereinafter, *Tilley*) will have a significant adverse effect on single employer defined benefit plans, which is the type of plan to which Tilley applies. Single employer defined benefit plans constitute the most important element of our private pension system. The Office of Policy Research of the

Pension and Welfare Benefits Administration of the Department of Labor estimates that as of the end of 1987 there were approximately 230,000 private single employer defined benefit plans having 31.4 million participants and $865 billion in assets. While these figures have not yet been published, they are consistent with the figure published by the Pension Benefit Guaranty Corporation (Hereinafter PBGC) showing more that 30 million participants in PBGC insured single employer plans in 1986 (certain defined benefit plans are exempt from PBGC coverage),[1] and with data published by the Employee Benefit Research Institute, Washington, D.C., as to the number of defined benefit plans in 1986[2] and the assets in these plans in 1987.[3]

We cite these numbers because we believe it is very important that the Court understand the vast magnitude of the single employer defined benefit plan system in the United States, and the vital role this system plays in providing our aging population with adequate retirement income. (Based on current demographic projections, many Americans will experience retirement periods of up to a quarter of a century.) Single employer defined benefit plans constitute the type of plan from which most of our citizens who are participants in the private pension system will derive their benefits. The assets in these plans also play a vital role in providing investment capital to our economy. Any factor that would significantly impact on these plans in a negative way would obviously have devastating results. For the reasons described below, we believe *Tilley* will have such a significant negative impact.

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[1]*See* 1986 Annual Report to Congress, Pg. 6. 1987 Annual Report not yet published.

[2]*See* Employee Benefit Notes — May, 1988, Pg. 7.

[3]*See* Quarterly Pension Investment Report, Fourth Quarter 1987, Pg. 57.

Tilley, in concluding that ERISA Section 4044(a)(6) refers to unaccrued early retirement benefits, is contrary to the long established understanding and practice of the professional pension community and will make it difficult for pension administrators and actuaries to complete plan terminations. Most plans include early retirement benefits of some kind. Prior to 1984, it would have been very unusual that a plan made a provision for the payment of early retirement benefits to participants who did not satisfy the conditions for those benefits as of the date of plan termination. Since then, in compliance with the Retirement Equity Act of 1984, plans have provided for the payment of early retirement benefits to participants who actually meet the conditions for entitlement after the date of termination.[4] Furthermore, the reasoning in *Tilley* is capable of being vastly expanded to benefits other than early retirement benefits, as occurred in the *Blessitt* Case. *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), rehearing *en banc* granted, 836 F.2d 1571 (11th Cir. 1988). Because of conflict between *Tilley* and well established administrative agencies' rules and interpretations governing the distribution of assets upon termination of a pension plan, pension actuaries and administrators are placed in a quandary with regard to how to process plan terminations.

Furthermore, *Tilley* will call into question past terminations and reversions. In a report dated December 15, 1987, to the

[4]Section 301(a) of the Retirement Equity Act of 1984 amended ERISA Section 204(g), 29 U.S.C. 1054(g) and Internal Revenue Code Section 411(d)(6) effective July 30, 1984, to require that plans that terminate on or after that date make provision for the payment of early retirement benefits to participants who actually meet the conditions for early retirement after termination. See also Rev. Rul. 85-6, 1985-1, C.B. 133. The Plan in the *Tilley* case terminated prior to July 30, 1984. Furthermore, the Court in this case required payments to participants at the time of termination without regard to whether the conditions for early retirement are ever met.

Chairman of the United States Senate Special Committee on Aging, PBGC reported that about 81,000 valid notices of single and multiemployer plan terminations had been received since the enactment of ERISA in 1974. In 1986 alone, the PBGC received termination notices for more than 6,800 plans, covering over 800,000 participants. The vast bulk of these notices relate to single employer defined benefit plans. In addition, there are many plans not subject to PBGC which are subject to the requirements of Section 4044 which terminate each year. Consequently, if *Tilley* is not reversed, we anticipate that there will be a massive amount of litigation with respect to terminations that have already taken place.

The principle established by *Tilley* requires that surplus plan assets upon termination of a defined benefit plan be used to provide unaccrued benefits. As a result, employers will be disinclined to adopt conservative funding approaches (which produce higher funding levels) for single employer defined benefit plans fearing that any actuarial surplus that arises from conservative assumptions or favorable investment returns will be distributed to employees. Further, by encouraging decreased funding, *Tilley* will further impair the financial stability of the PBGC which is already faced with a $2 billion deficit ($4 billion if its position in the LTV litigation with respect to the restoration of three plans is not upheld). The decreased benefit security and impaired government insurance program that will result from *Tilley* is not in accord with the clear intent of ERISA to strengthen employee security in connection with the private pension system.

Single employer defined benefit plans have long operated on the assumption that the plan sponsor was entitled to assets upon termination in excess of those required to fund accrued benefits. This was a balanced arrangement, since the employer is responsible for additional funding to provide the benefits

under the plan if poor investment or other experience cause the plan to be underfunded. *Tilley* will not only cause the specific results we have already described — uncertainty as to how to process terminations, massive litigation with respect to terminations already completed, and lower funding levels, but will create significant doubts in the minds of employers as to whether they wish to be sponsors of single employer defined benefit plans because of the fact that fundamental and long understood ground rules are subject to sudden reversal.

ARGUMENT

A. The Fourth Circuit Erred in Interpreting Unaccrued Early Retirement Benfits as "Other Benefits" Under Section 4044(a)(6) of ERISA

The Fourth Circuit, relying on dictum in *Amato v. Western Union International*, 773 F.2d 1402 (2d Cir. 1985) *cert. dismissed*, 106 S. Ct. 1167, 89 L. Ed. 2d 288 (1986), concluded that unaccrued early retirement benefits constituted "other benefits under the Plan" within the meaning of 29 U.S.C. Section 1344(a)(6) (ERISA Section 4044(a)(6)) and that such benefits must be considered in determining the value of an employee's benefit upon termination of the plan.

It is respectfully submitted that the Fourth Circuit erred in following the *Amato* case dictum by holding that the early retirement benefits were other benefits under Section 4044(a)(6) of ERISA.

A review of the legislative history[5] surrounding the passage of Section 4044 does not indicate that rights to benefits are created independent of the plan provisions. Rather such Section simply prioritizes the distribution of assets upon termination to protect certain classes of benefits in the event there is insufficient assets to satisfy all benefit entitlements.

[5] S. Rep. 93-383 at 84 (August 21, 1973) and Conf. Rep. 93-1280 at 376 (August 12, 1974).

The pertinent section of 4044(a) provides in part:

> In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> . . . .
>
> (5) Fifth, to all other nonforfeitable benefits under the plan.
>
> (6) Sixth, to all other benefits under the Plan.

In the *Amato* case, the Court seems to ground its dictum on the absence of the phrase "other accrued benefits" from Section 4044(a)(6) of ERISA (sometimes referred to as "Category 6 Benefits"). We believe this deletion in the final text did not reflect an intention to require a terminated plan to provide unaccrued benefits. Had the Conference Committee intended such a result, which would have been dramatically different than the House and Senate bills, and pre-ERISA law, it surely would have made specific reference to such an intent. No such reference can be found in the Conference Committee report. It should be noted that elsewhere the ERISA drafters specifically discussed areas, such as vesting, prohibited transactions, and salary reduction plans, where ERISA altered prior law or where the final statute differed from predecessor bills.

This failure to indicate specifically any intention to require a terminated plan to provide unaccrued benefits is particularly significant in view of the long-standing, clearly expressed

Congressional intent to allow reversions of assets not needed to pay accrued benefits upon plan terminations. For 50 years, Congress has considered the reversion issue on numerous occasions, and has knowingly sanctioned the reversion to employers of assets not needed to pay accrued benefits upon termination. This issue was considered recently in connection with the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 203, 100th Congress, 1st Session (1987) (OBRA 1987). The House Education and Labor Committee and the Senate Labor and Human Resources Committee proposed to amend ERISA Section 4044(d) to provide a "minimum benefit cushion" (up to 25% of assets first allocated under Section 4044(a)) which would have to be paid to participants before there could be a reversion to employers. These proposals were eliminated in the final version of OBRA 1987.

B. The Fourth Circuit's Decision Is Contrary To The Uniform Interpretations of Section 4044 Of ERISA By The Responsible Administrative Agencies

The Fourth Circuit's decision is contrary to the uniform interpretations of ERISA Section 4044 by the PBGC, the Department of Labor, and the Department of Treasury.

These administrative agencies adopted guidelines for processing defined benefit plan terminations involving asset reversions in PBGC News Release No. 84-23 (May 23, 1984). These Guidelines provide, with respect to plan terminations, that an employer may recover surplus assets after it has purchased and distributed annuity contracts to protect participants against the risk that their accrued benefits may be jeopardized by future market fluctuations or other factors. By contrast, there is no provision for protecting unaccrued benefits.

Consistent with the foregoing, the PBGC has always construed Section 4044(a)(6) and its regulations at 29 C.F.R. Section 2618.16 to limit Section 4044(a)(6) to accrued benefits. *See* PBGC Opinion Letters 86-1, (January 15, 1986), 85-9 (April 5, 1985) and 85-28 (December 2, 1985).

It should be noted, furthermore, that PBGC submitted an *amicus curiae* brief in support of a petition for rehearing of the *Tilley* decision by the United States Court of Appeals for the Fourth Circuit. It is noted on Page 12 of this brief that "The PBGC has never interpreted its regulation to require the payment of unaccrued benefits." PBGC noted further, on Page 14, and we wholeheartedly concur, that "Because the PBGC is the executive agency charged with administering the provisions of Title IV of ERISA, its views on issues arising out of plan terminations are entitled to great weight. *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 373-74 (1980); *Belland v. Pension Benefit Guaranty Corporation*, 726 F.2d 839, 843 (D.C. Cir. 1984); *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *Concord Control, Inc. v. International Union, UAW*, 647 F.2d 701, 704 (6th Cir.), *cert. denied*, 454 U.S. 1054 (1981)."

Moreover, the Internal Revenue Service (IRS) in Rev.Rul. 80-229, 1980-2 C.B. 133 (1980) has provided guidelines for determining whether an asset reversion upon plan termination was proper under I.R.C. Section 401(a)(4) (nondiscrimination rules), I.R.C. Section 411(d)(2) and (3) (vesting standards) and ERISA Section 4044(a). In discussing the appropriate treatment of plan assets in excess of the participant's accrued benefits, the Ruling provides that "If the assets as of the date of termination *exceed the present value of the accrued benefits* (whether or not nonforfeitable) as of such date, the plan will not be considered discriminatory if such excess reverts to the

employer or is applied to increase benefits in a non-discriminatory manner (emphasis added)." It should be noted that on September 27, 1987, subsequent to *Blessitt*, the IRS General Counsel issued a Memorandum (GCM 39665) stating that "Nothing in the legislative history of ERISA supports the view that section 4044(a) creates substantive requirements as to what constitutes a liability."

CONCLUSION

It is our view that *Tilley* is legally incorrect and will cause serious damage to the single employer defined benefit system if not reversed. It will disrupt the stability of the system by creating significant uncertainty as to how to process plan terminations and by raising questions as to the legality of distributions to participants and reversions to employers under terminations that have already occurred. It will cause a major change in the funding approaches to single employer defined pension programs, which will weaken employee benefit security. Furthermore, it will create doubts in the minds of employers as to the wisdom of being involved in a system wherein longstanding, well understood rules established by Congress and clearly enunciated by the federal agencies having administrative responsibility are suddenly overturned. We ask therefore that the writ of certiorari be granted.

Respectfully Submitted,

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AMICUS CURIAE

BRIEF

8

No. 87-1868

IN THE

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OCTOBER TERM, 1987

THE MEAD CORPORATION,

Petitioner,

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B.E. TILLEY, *et al.*,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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---

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the Petitioner in No. 87-1868, having obtained the written consent of both the Petitioner and the Respondent to file same.

INTEREST OF THE *AMICUS CURIAE*

In *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987), the Court of Appeals for the Fourth Circuit created a new benefit entitlement for pension plan participants by holding that participants may be en-

titled to unaccrued benefits upon their employer's termination of a pension plan. The Fourth Circuit based its precedent-setting decision on *dicta* from the decision by the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986). The Chamber of Commerce of the United States of America (the "Chamber") contends that the Fourth Circuit erred in creating the new entitlement and that it misconstrued the *dicta* in *Amato*.

The Fourth Circuit's error has far-reaching consequences. It dismantles the framework under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*,[1] for resolving conflicting benefit claims of different classes of employees upon the termination of their pension plans. Moreover, if left standing, *Tilley* will generate extensive litigation over billions of dollars in benefits already allocated in plans terminated prior to its existence. Rectification of the Fourth Circuit's error is of great importance to the Chamber as the nation's largest federation of business and professional organizations and to many of the 180,000 corporations, partnerships and proprietorships that the Chamber represents, including, most significantly, the many whose pension plans have already been terminated and their assets distributed inconsistently with *Tilley*.

ARGUMENT

Congress has never required employers to establish pension plans and, if they do, has never placed any

[1] All references herein to specific sections of the statute are to ERISA as amended rather than to its codification in the United States Code.

minimum requirement on the amount of the pension benefit to be paid. Indeed, prior to ERISA (1974), Congress had done virtually nothing to regulate the terms of pension plans. It was common, for example, for plans to provide a pension benefit payable at age 65 with 30 years of service, but to provide no benefit whatsoever if the participant discontinued participation in the plan, for any reason, with 29 years of service. *See, e.g., International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Daniel*, 439 U.S. 551, 554-55 (1979).

ERISA changed that. Under ERISA, when participants reach retirement age, the benefits they have been promised, and for which they have worked, will in fact be paid even if they have, as in the example above, only 29 years of service. To achieve this goal, ERISA requires pension plans, *inter alia*, to state the amount (or the formula for determining the amount) of the "normal retirement benefit" that will be paid under the plan at "normal retirement age." ERISA §§ 3(22) and (23), 203(a), and 402(a)(1) and (b)(4). Additionally, pension plans must vest participants in a benefit they have earned under the vesting and accrual rules even if they have not worked to "normal retirement age." ERISA §§ 3(23), 203, and 204. And plans must provide rules for determining the amount of the normal retirement benefit which the participant has earned or "accrued" at any time, as well as the portion of that accrued benefit in which he has acquired a nonforfeitable or "vested" right. ERISA §§ 203 and 204.[2]

[2] Section 203 of ERISA (the "vesting" rule) governs the vesting of a pension and specifies the point at which a pension

In ensuring that employees receive the pension benefits that they have earned, Congress was concerned, however, not to discourage employers from establishing pension plans at all. Accordingly, Congress limited the application of both the vesting and accrual rules to the statutorily-defined "accrued benefit," which is "the individual's accrued benefit determined under the plan and ... expressed in the form of *an annual benefit commencing at normal retirement age.*" ERISA § 3(23) (emphasis added).

"Accrued benefits" do not include, and the statutory vesting and accrual rules do not apply to, "ancillary benefits" which are provided by some plans in addition to the annual benefit payable at the normal retirement age of 65 (the "normal retirement benefit"). In this respect, Internal Revenue Service regulations provide that "[a]ccrued benefits do not include *ancillary benefits* not directly related to retirement benefits such as payment of medical expenses ..., incidental death benefits, current life insurance protection, or medical benefits described in [Internal Revenue Code] Section 401(h)" and that "a *subsidized early retirement benefit* which is provided by a plan

benefit has become vested or "nonforfeitable"; the Section says nothing whatsoever about the amount of the pension that becomes nonforfeitable. Section 204 (the "accrual" rule) governs the amount of the pension earned or "accrued" at any given point. The purpose of § 204 is to require that a (roughly) ratable portion of the normal retirement benefit is earned with each passing year. The section generally prohibits "backloading," whereby a small part of the normal retirement benefit is deemed to be earned in the early years of an employee's career, with nearly all of the benefit deemed to be earned in the last few years of service.

is not taken into account ...." 26 C.F.R. § 1.411(a)-7(a)(1) (1977) (emphasis added).

A participant acquires an enforceable right to an "ancillary benefit," such as a "subsidized early retirement benefit," only upon full satisfaction of all the plan's conditions for such a benefit. ERISA § 4001(a)(8). Accordingly, where a plan offers a subsidized early retirement benefit to persons who have performed 30 years of service and have reached age 62 while still employed, a participant would have a right to that benefit only if he actually satisfied both the age and service requirements while employed.[3] Thus, if the participant terminated employment prior to completing 30 years of service or to reaching age 62, the participant would have no entitlement to any part of the subsidized early retirement benefit.[4] This is because subsidized early retirement benefits were generally considered to be ancillary benefits not subject to ERISA's accrual rules. H.R. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code

[3] The example cited is identical to the plan provision at issue in *Tilley*. *See* Article V, § 2(b) of the Mead Industrial Products Salaried Retirement Plan (the "Plan"), Appendix to the Petition for a Writ of Certiorari filed by The Mead Corp. (the "Appendix") at 21a. The early retirement benefit in § 2(b) of the Mead Plan is "subsidized" or "unreduced" because it is not reduced by actuarial factors to reflect the fact that it begins to be paid at age 62, rather than age 65, and is thus worth more than the same monthly sum payable as the normal retirement benefit at age 65. *Cf.* the "subsidized" early retirement benefit under Mead Plan Article V, § 2(b) to the "unsubsidized" early benefit under § 2(a) of the same Article, which is reduced in accordance with the age at which it begins to be paid.

[4] The participant would, however, be entitled to a ratable part of the normal retirement benefit payable at age 65.

Cong. & Admin. News 5038, 5054; *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984), and *Bencivenga v. Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574, 577-78 (3rd Cir. 1985); Pension Benefit Guaranty Corporation Opinions No. 87-11, Appendix at 43a, and No. 86-1, Appendix at 47a.

Notwithstanding this and other authority to the contrary, the Second Circuit incorrectly held in *Amato* that subsidized early retirement benefits were "accrued," rather than "ancillary," benefits and were therefore subject to ratable earning under the ERISA accrual rules. *See* Petitioner's Brief at footnote 12. 773 F.2d at 1410 (court reviews legislative history explanation of ancillary benefits, but concludes that "Congress was not referring to unreduced [subsidized] early retirement benefits") and *id.* at 1414 ("[t]he district court . . . erred in dismissing . . . on the ground that unreduced [subsidized] early retirement benefits are not 'accrued benefits' within the meaning of [the statute]"). Accordingly, in the view of the Second Circuit alone, neither plan terminations nor plan amendments may eliminate the earned portions of subsidized early retirement benefits even though participants have not fully satisfied *all* the plan's conditions for those benefits.

Moreover, the Second Circuit compounded its error by inexplicably and unnecessarily expanding its holding with *dicta* that has subsequently caused much misunderstanding. In its mischievous *dicta*, the Second Circuit agreed that, upon plan termination, the employees were entitled to "all their benefits under the plan, *whether or not those benefits are accrued*."

773 F.2d at 1415 (emphasis added). *Amato* used the term "accrued", however, in the strict statutory sense of "accrued benefits" under § 3(23) of ERISA and 26 C.F.R. § 1.411(a)-7(a)(1), *i.e.*, in contrast to "ancillary benefits." *Amato* did not use the term "accrued," as the Fourth Circuit has in *Tilley*, to mean the earned or accrued part of the "accrued benefit" as defined in the statute.[5]

In 1984, while *Amato* was pending, Congress enacted the Retirement Equity Act ("REA") which treats subsidized early retirement benefits as accrued benefits for some purposes, but only with respect to plan terminations occurring after July 30, 1984. *See* Retirement Equity Act of 1984, § 302(d)(1), Pub. L. No. 98-397, 98 Stat. 1426, amending Internal Revenue Code § 411(d)(6) to state for the first time that a pension plan may not be amended or terminated if the effect is to:

> "eliminat[e] or reduc[e] an early retirement benefit or a retirement-type subsidy . . . with respect to benefits attributable to service before the amendment [for] *a participant who*

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[5] That *Amato* did not award benefits for *un*earned service is made clear by the fact that the plaintiffs in *Amato* did not even request such credit. Rather, the plaintiffs sought only a *pro rata* portion of the early retirement benefit "expressed as a fraction which corresponds to the portion of the [subsidized early retirement benefit] *already earned, e.g., 70/75.*" 773 F.2d at 415 (emphasis added). The Fourth Circuit in *Tilley* ignored this passage of *Amato*.

It is therefore clear that when *Amato* said in *dicta* that, upon plan termination, benefits are payable *whether or not accrued*, it meant only that the earned portions of other "accrued benefits" and "ancillary benefits" are payable.

satisfies (either before or after the amendment) the preamendment conditions for the subsidy . . ." (emphasis added).

The Mead Industrial Products Salaried Retirement Plan (the "Plan") was terminated in 1983 and, therefore, the subsidized early retirement benefit contained therein was not subject to REA. Upon termination of the Plan, its participants were, at their option, paid the lump sum present value of all benefits they had earned for service prior to the termination. Participants who, like the Tilley plaintiffs, had not fully satisfied the age and service requirements for a subsidized early retirement benefit were paid the present value of the normal retirement benefit that they had earned prior to termination. 815 F.2d at 991.[6] This benefit was assumed to be payable at age 65 and, accordingly, had a lower present value than a subsidized benefit payable at age 62. *Id.* The Tilley plaintiffs challenged their benefit distributions, and alleged that they were entitled to a lump sum benefit based on the subsidized amount payable at age 62, even though they had not yet fully satisfied the conditions for that benefit, and therefore earned it, under the Plan.

In analyzing the Tilley plaintiffs' claims, the district court properly focused on whether subsidized early retirement benefits are "accrued benefits" that must be ratably paid upon plan termination or "ancillary benefits" that need not be paid unless all conditions have been satisfied prior to the termination. The district court correctly held, in accord with Fourth Circuit precedent, that subsidized early retirement benefits were "ancillary benefits" rather than "accrued benefits" and, therefore, that the plaintiffs were not entitled to them because they had not fully satisfied the conditions for those benefits prior to the termination of the Plan. Appendix at 12a, citing *Sutton*, 724 F.2d at 410.[7]

[6] Most of the Plaintiffs had the necessary 30 years' service but had not reached age 62. One, W.L. Crotts, had satisfied neither the age nor the service requirement. 815 F.2d at 992.

On appeal, the Fourth Circuit reversed the district court's decision. The Fourth Circuit did not address whether subsidized early retirement benefits were "ancillary benefits" rather than "accrued benefits". Rather, the Fourth Circuit relied entirely upon a misconstruction of *Amato* to conclude that all unearned, unaccrued benefits, in the sense of benefits attributable to years of service not yet performed, are payable upon termination of the plan. Based upon its misunderstanding, the Fourth Circuit went on to create an entitlement to unearned, unaccrued benefits never before considered by Congress, the courts, or the federal agencies responsible for the implementation of ERISA.[8] In so doing, the Fourth Circuit dismantled the carefully-crafted priority system in §

[7] The district court did not use the term "ancillary," but merely found the benefits *not* to be "accrued benefits." The Court's meaning is clear, however, from its reference to *Sutton*, which does use the term "ancillary." 724 F.2d at 410.

[8] A panel of the Court of Appeals for the Eleventh Circuit in *Blessit v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987) also misunderstood *Amato*'s use of the term "accrued" and accordingly erred in the same way as the *Tilley* court has erred. The Eleventh Circuit, however, has granted rehearing *en banc* in *Blessit*. 836 F.2d 1571 (11th Cir. 1988).

4044(a) of ERISA, pursuant to which assets are allocated in terminated pension plans to pay conflicting classes of benefit claims.

To avoid these consequences, this Court should disregard the misconstruction in *Amato* and recognize that the subsidized early retirement benefits promised by the Mead Plan were merely "ancillary" rather than "accrued benefits." The district court in *Tilley* correctly recognized and decided that issue, holding that subsidized early retirement benefits were not "accrued benefits" payable upon plan termination. Although the Fourth Circuit did not address this issue, it did apply accrual rules to subsidized early retirement benefits. In fact, the Fourth Circuit did more. It also granted credit, for purposes of qualifying for that subsidized benefit, for service that would not be performed. By doing so, the Fourth Circuit not only effectively imposed REA retroactively, but radically exceeded REA's modifications of ERISA.

Under ERISA as originally enacted, upon the termination of a plan that provided subsidized early retirement benefits for participants with 30 years' service who work to age 62, a participant (like Crotts here, *see* note 6 *supra*) who had 28 years of service and was age 60 at the time of termination would be entitled to an annuity purchased from plan assets pursuant to which an insurance company would be obligated to pay the participant his accrued benefit beginning at age 65. For example, if the annual normal retirement benefit at age 65 was $500 multiplied by the number of years of service, the annuity would provide an annual benefit at age 65 of $14,000 ($500 x 28 years).

REA amended ERISA in this respect. Under REA, if the participant elects an annuity payment option, the annuity purchased by the plan would have to provide that, *if* the participant worked for the employer for two years after the termination and reached age 62 while so employed, the participant would receive the $14,000 annual benefit (28 x $500) beginning at age 62. In other words, REA requires that the annuity contingently provide for the participant's becoming eligible for the subsidized benefit after the plan terminates. The plan must, of course, pay an additional premium to the insurer for this additional, contingent liability.

The Fourth Circuit in *Tilley* significantly exceeded REA by holding that the participant is to be automatically presumed to have worked the additional two years, whether he does so or not, for purposes of determining eligibility for the subsidized early retirement benefits.[9] Thus, if the participant elects the annuity payment option, the annuity must provide, without contingency, that the participant will receive a benefit of $14,000 ($500 x 28 years) at age 62. If the participant elects a lump-sum payment option as offered by the plan, the lump sum must be the present value of the benefit payable at age 62 without actuarial discount to reflect the probability of the participant's not in fact working the two additional years with the employer and becoming age 62 while so employed. 815 F.2d at 992. Accordingly, *Tilley* holds that any participant is eligible upon plan termination

[9] If the Fourth Circuit's conclusion in *Tilley* is correct, then REA would represent a cut-back in the benefits to which participants are entitled under ERISA, rather than, as was clearly intended by Congress, an expansion of those benefits.

for a subsidized early retirement benefit, no matter what payment option he selects, even though he may be years short of earning it.

The Fourth Circuit made its leap beyond REA, giving credit for unearned service, based upon its misconstruction of § 4044(a)(6) of ERISA, which requires, upon plan termination, payment of "all other benefits under the plan" before any plan assets may revert to the employer. In interpreting the phrase "all other benefits," the Fourth Circuit relied upon the assertion in *Amato* that the language in § 4044(a)(6) indicates that Congress "decided not to limit the allocation requirement to *accrued* benefits, but to require that, as long as assets were available, they should be used to meet participants' *benefit expectations* based upon the Plan's full benefit structure." *Tilley*, 815 F.2d 989 at 992 (emphasis added).

Once again, however, it is clear from the context of *Amato* that the Second Circuit held only that the allocation of assets to pay benefits under § 4044(a)(6) is not limited to "accrued benefits" but also includes "ancillary benefits," which *Amato* misleadingly referred to as "benefit expectations." The Second Circuit did not use the term "benefit expectations" to suggest that unearned benefits, in the sense of benefits attributable to years of service not yet performed, should be covered by the allocation rules in § 4044(a)(6). 773 F.2d at 1415-16. *See* note 5, *supra*. Indeed, it appears clear that the *Tilley* court simply did not understand *Amato's* use of the terms "unaccrued benefits" and "benefit expectations." Each of those terms is used in *Amato* to mean "ancillary benefits," not unearned benefits.

The Fourth Circuit's error also reflects a misunderstanding of the categories of benefits eligible for payment in a terminated plan under § 4044(a) of ERISA. That misunderstanding, again, was undoubtedly fostered by the Court's uncomprehending reliance on *Amato*.

The highest category of benefits in § 4044(a) that is pertinent to this case is Category 5. Category 5 covers "all . . . nonforfeitable benefits" that are not covered in preceding categories. ERISA § 4044(a)(5). The residual category, Category 6, then covers "all other benefits under the plan." ERISA § 4044(a)(6). Since the passage of ERISA, Category 6 has consistently been interpreted to include only accrued benefits in the sense of benefits attributable to years of service actually performed as of the termination date, but in which the participant has not become "vested" prior to plan termination and which are therefore not covered under categories 1-5.[10] Under many plans, including the Mead Plan, for example, in which participants do not become vested in their benefits until they have completed 10 years of service, Category 6 includes the benefits earned by all participants with fewer than ten years of service prior to termination of the plan. Category 6 thus protects a meaningful and substantial universe of plan benefits and participants.

By construing Category 6 to include not only benefits actually earned as of plan termination, but also benefits unearned as of that time, the Fourth Circuit

[10] *See* PBGC Opinion Letter 86-1 (January 15, 1986), and the preamble to the PBGC's proposed regulations on this point, 40 Fed. Reg. 51368, 51370 (November 4, 1975).

has frustrated the clear purpose of ERISA to protect benefits earned by participants. Under the pre-*Tilley* interpretation of § 4044(a)(6), all assets remaining after payment of benefits through Category 5 are available to pay accrued-but-not-yet-vested benefits under Category 6. The Fourth Circuit's interpretation of § 4044(a)(6), however, would require that any assets available to provide Category 6 benefits be allocated not only to benefits accrued by participants prior to the termination, but also to *un*accrued "benefit expectations."[11] Accordingly, a participant with nine years of service prior to the termination (who had thus earned a substantial accrued benefit) would have his rights to plan assets upon plan termination diluted by the inclusion in Category 6 of unearned benefits.

The following example illustrates the anomaly that arises from *Tilley*:

> Example: Plan provides an annual benefit equal to $500 per year of service. Participant A had 9 years of service prior to the termination of Plan, and thus has accrued an annual benefit of $4500. Participant B has only 1 year of service, and thus has an accrued annual benefit of $500. However, since both participants will be presumed by *Tilley* to continue employment long enough to earn 30 years of service, both A's and B's benefit expectations will be equal ($15,000 per year).
>
> Because neither participant had the 10 years of service required under the plan to acquire a nonforfeitable benefit prior to termination, both participants' benefits would be paid out of Category 6 assets. If these assets equalled $5,000 (and there were no other participants entitled to share in the Category 6 allocation), Participants A and B would receive the following amounts from the plan:

[11] Indeed, the Fourth Circuit's interpretation was so expanded by a panel of the Eleventh Circuit in *Blessit*. *See* note 8, *supra*.

	Under "Accrued Benefit" Interpretation	Under "Benefit Expectations" Interpretation
Participant A	$4,500	$2,500
Participant B	$ 500	$2,500

As this example illustrates, the Fourth Circuit's "benefit expectations" theory could result in a participant receiving less than his earned, accrued benefit, even though the plan had been sufficiently funded to provide this benefit, while other participants would receive benefits for service that would never be performed. Indeed, the likely result of the Fourth Circuit's interpretation of § 4044(a)(6) is to deprive participants of a portion of their earned, accrued benefits, in violation of ERISA's pervasive scheme to protect the benefits earned by participants.[12]

[12] The Fourth Circuit's interpretation of § 4044(a)(6) is particularly incomprehensible in light of Congress' enactment of REA. *See* 26 U.S.C. § 411(d)(6). If the Fourth Circuit's interpretation of § 4044(a)(6) were correct, Congress' enactment of protection for subsidized early retirement benefits in REA would have been entirely superfluous. The protection for early retirement benefits added by REA in § 411(d)(6) expressly applies only "with respect to benefits attributable to service before the amendment" or termination. Congress would hardly have needed to protect early retirement benefits earned prior to termination if § 4044(a)(6) already did so.

Moreover, the Fourth Circuit's reading of § 4044, by preventing any reversion to employers prior to the satisfaction of "benefit expectations," requires employers to pay pension benefits for service that, as with the Mead Corp., will never be performed. That is clearly contrary to ERISA which has never even required employers to maintain a pension plan at all. It is also clearly contrary to the reversion provision of § 4044(d)(1) of ERISA, which encourages employers to generously fund pension plans by assuring them that, if they do overfund the plans, their excess contributions will ultimately be returned.[13] If *Tilley* is the law, no reversions will ever occur as a practical matter and, as a practical matter, employers will be less generous in funding their plans.

CONCLUSION

For all the foregoing reasons, the Court should grant the petition for writ of certiorari.

[13] Several courts have found that the availability of reversions is consistent with the policies of ERISA by providing that employers "will not be penalized for overfunding in 'an abundance of caution' or as a result of miscalculation on the part of an actuary." In re C.D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1132-33 (E.D.Pa. 1977), *aff'd*, 582 F.2d 1273 (3rd Cir. 1978).

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(14)

NO. 87-1868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE MEAD CORPORATION,
Petitioner

v.

B. E. TILLEY, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 16, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

TABLE OF CONTENTS

*The Respondents, who were Plaintiffs in the District Court and Appellants in the Court of Appeals, are referred to as "Employees"; the Petitioner is referred to as "Mead".

NOTATION CONCERNING LOCATION OF PRINTED OPINIONS, DECISIONS AND JUDGMENTS

The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari ("Pet. App."):

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN COURTS BELOW

A. STATE COURT DOCKET ENTRIES

1. June 15, 1984 .... Employees' Motion for Judgment

B. DISTRICT COURT DOCKET ENTRIES

1. July 13, 1984 .... Mead's Verified Petition for Removal
2. November 29, 1984 .. Employees' Amended Complaint
3. December 17, 1984 .. Mead's Answer to Amended Complaint
4. November 15, 1985 .. Employees' Motion for Partial Summary Judgment
5. February 24, 1986 ... Agreed Order of Partial Dismissal With Prejudice and of Stipulation as to Employees' Motion for Partial Summary Judgment
6. March 14, 1986 ..... Hearing on Employees' Motion for Summary Judgment
7. March 27, 1986 ..... Mead's Cross-Motion for Summary Judgment as to the Liability Issues on Employees' ERISA Claims
8. March 27, 1986 ..... Affidavit of Richard E. Emerick in Support of Mead's Cross-Motion for Summary Judgment
9. April 8, 1986 .... Memorandum Opinion and Final Judgment Denying Employees' Motion for Summary Judgment and Granting Mead's Motion for Summary Judgment

10. May 15, 1986 .... Employees' Notice of Appeal

C. COURT OF APPEALS DOCKET ENTRIES

1. July 30, 1986 .... Briefing Order: Employees' Brief due September 8, 1986
2. September 12, 1986 .. Employees' Motion to Include Exhibit as Part of Employees' Opening Brief
3. September 26, 1986 .. Order Granting Employees' Motion to Include Exhibit
4. September 26, 1986 .. Employees' Brief Filed
5. October 1, 1986 ..... Employees' Reply Memorandum in Support of Their Motion to Include Exhibit
6. January 6, 1987 ..... Oral Argument
7. April 9, 1987 .... Decision and Judgment
8. March 22, 1987 ..... Mead's Petition for Rehearing and Suggestion for Rehearing En Banc
9. August 11, 1987 ..... Motion of Pension Benefit Guaranty Corporation ("PBGC") for Leave to File Brief as Amicus Curiae Out of Time in Support of Mead's Petition for Rehearing

10 September 8, 1987 .. Order Granting PGBC's Motion

11. September 22, 1987 .. Motion of American Society of Pension Actuaries ("ASPA") in Support of Mead's Petition for Rehearing
12. October 1, 1987 ..... Order Granting ASPA's Motion

13. October 1, 1987 . . . . . Motion of National Institute of Pension Administrators ("NIPA") for Leave to File Amicus Curiae Brief in Support of Mead's Petition for Rehearing

14. February 17, 1988 . . . Order Denying Mead's Petition for Rehearing and Suggestion for Rehearing En Banc

Case No. 84-0571

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

B. E. TILLEY, et al.,

Plaintiffs,

v.

THE MEAD CORPORATION

Defendant.

AMENDED COMPLAINT

(Filed November 29, 1984)

TO THE HONORABLE JUDGES OF SAID COURT:

COME NOW the Plaintiffs, by Counsel, and represent the following:

The present case is an action by six (6) former employees of The Mead Corporation to recover pension funds wrongfully withheld from them when the plan was terminated.

JURISDICTION

1. This case comes before this Court by a verified petition for removal filed by the Defendant pursuant to 28 U.S.C. Sec. 1446.

THE FACTS

2. All of the Plaintiffs were employees of Lynchburg Foundry Company, which on January 1, 1982, was a wholly-owned subsidiary of the Defendant, The Mead Corporation. B. E. Tilley had been an employee of Lynchburg Foundry Company since June 2, 1947; David H. Wall since February of 1950; William L. Crotts, Jr. since July 1, 1955; Chrisley H. Reed since October of 1951; J. C. Weddle since June 26, 1946; and William D. Goode since March 1, 1952.

3. The Defendant, The Mead Corporation, maintained a pension plan covering three (3) companies: Lynchburg Foundry Company, Mulga Coal Company and Murray Rubber Company. The plan was applicable to all Plaintiffs herein and is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein. Such pension plan was covered by the Employee Retirement Income Security Act, 29 U.S.C.A. Sec. 1003.

4. On or about January 1, 1982, the Defendant, The Mead Corporation, made certain offers to all of the Plaintiffs which contained a promise to pay to the Plaintiffs certain sums if the Plaintiffs chose to take early retirement under a voluntary retirement program. The offer for early retirement was to be effective on April 1, 1982, and offered to pay in the event of election of early retirement the sum of $124,402.05 at such early retirement date to B. E. Tilley; to David H. Wall the sum of $96,304.00; to William L. Crotts, Jr. the sum of $98,872.50; to Chrisley H. Reed the sum of $90,886.32; to J. C. Weddle the sum of at least $120,000.00; and to William D. Goode the sum of $108,090.31. The Defendant offered the Plaintiffs in the alternative, if B. E. Tilley would remain in the Defendant's employment until reaching age sixty-two (62) to pay him the sum of $173,407.63; to pay to David H. Wall for remaining in Defendant's employ until age sixty-two (62) the sum of $123,073.51; to William L. Crotts, Jr. for remaining in Defendant's employ until age sixty-five (65) the sum of $123,627.61; to pay to Chrisley H. Reed for remaining in Defendant's employ until reaching age sixty-two (62) the sum of $120,198.11; to pay to J. C. Weddle for remaining in Defendant's employ until reaching age sixty-two (62) the sum of $170,000.00; and to pay to William D. Goode for remaining in Defendant's employ until reaching age sixty-two (62) the sum of $141,167.21. The foregoing offers were communicated to the Plaintiffs in writing.

5. Included in the special offer, the Defendant corporation gave the Plaintiffs a complete table showing a breakdown of their pension plan benefits. These tables are at-

tached hereto as Exhibits B-1 through B-6 and incorporated by reference as if fully set forth herein.

6. All of the Plaintiffs in the instant case declined to take the sums offered and instead accepted the Defendant's offer of the higher benefits if the Plaintiffs remained in the Defendant's service.

7. At no time did the Defendant ever indicate that the termination of the plan would adversely affect the rights of the participants. In fact, the Defendant repeatedly informed the Plaintiffs that the plan was fully funded and in sound financial condition.

8. In 1982 Mead announced the sale of Mulga Coal Company. No details were given nor information made available concerning the handling of pensions or other benefits for Mulga employees under the pension plan.

9. In March of 1983 the Defendant, The Mead Corporation, announced plans to divest themselves of the remaining units which comprised the pension plan, Lynchburg Foundry Company and Murray Rubber Company.

10. In June of 1983 the Defendant announced the sale of the Lynchburg Foundry Company to another corporation. The effective date of change of ownership was June 28, 1983. No information was made available as to the status of the employees or their benefits.

11. On July 14, 1983, the Defendant, The Mead Corporation, gave notice to all salaried employees that the pension plan was to be terminated effective August 1, 1983.

12. Mary Flynn and Pat Barnard of the Mead benefits department met with Radford employees of the Lynchburg Foundry Company on July 21, 1983. Under questioning Ms. Flynn acknowledged that Mulga Coal Company pension plan settlements were not handled in the same way. She would not, however, elaborate as to the differences.

13. Final payment of pension plan benefits occurred on February 1, 1984, seven (7) months after the effective date of the plan termination. During these seven (7) months, the Defendant had full control over these funds but the final pay-

ment did not include interest or other payments for the use of the pension funds.

14. The final payment to the Plaintiffs on February 1, 1984, consisted of a lump-sum payment to B. E. Tilley in the sum of $87,108.74; to David H. Wall in the sum of $65,360.80; to William L. Crotts, Jr. in the sum of $90,654.25; to Chrisley H. Reed in the sum of $69,909.01; to J. C. Weddle in the sum of $49,309.00; and to William D. Goode in the sum of $83,923.93. Since that time, the Defendant has discontinued any payments into any retirement fund on behalf of the Plaintiffs and has indicated that no further payments will be made to the Plaintiffs notwithstanding their intention to remain in the employment of the Lynchburg Foundry Company.

15. The Defendant had a policy of changing formula on which the benefits were based. The Pension Plan itself sets forth the following formula at Article V, Section 1:

> A Participant who retired at or after his normal retirement date shall be entitled to a retirement income for life payable monthly equal to the greater of the amounts specified in Paragraphs (a) or (b) for all years prior to January 1, 1976, plus the amount specified in Paragraph (c) for all years after December 31, 1975, as follows:
>
> (a) An annual amount equal to (i) for years prior to January 1, 1968, for each year of Credited Past Service an amount equal to .75% of the first $6,600.00 of Earnings plus an amount equal to 1.25% of Earnings in excess of $6,600.00 plus (ii) for each year of Credited Service subsequent to December 31, 1967, but prior to January 1, 1976, an amount equal to 1% of the first $6,600.00 of Earnings and an amount equal to 1.5% of Earnings in excess of $6,600.00; or
>
> (b) An annual amount equal to the greater of (i) $60.00 multiplied by years of Credited Past Service up to a maximum of thirty-five (35) years with proportionate allowance for completed months or (ii) an annual amount which, including the Primary Social Security Benefits provided under Section 1(d) of this Article, is equal to 1.25% of Final Average Earnings as defined in Section 12(a) of Article I, as of January 1, 1976 multiplied by years of Credited Past Service, with proportionate allowance for completed months, up to a maximum of thirty-five (35) years.
>
> (c) For years after December 31, 1975, an annual amount equal to 1¼% of total annual Earnings subsequent to December 31, 1975.
>
> (d) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to one and forty-three/one hundredths percent (1.43%) times years of Credited Past Service with proportionate allowance for completed months, up to a maximum of thirty (30) years by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at the date of his retirement or termination of employment.

16. The Defendant later put forth an explanatory booklet which uses a different formula. The slick paper booklet is entitled "Mead Industrial Products Salaried Retirement Plan Benefits" and is without a date. Pages two and three of the booklet set forth the following formula:

> HOW MUCH WILL MY RETIREMENT INCOME BE?
>
> Your retirement income will be calculated in two ways — by a base formula and a test formula. You will automatically receive the larger amount.
>
> WHAT DOES THE BASE FORMULA PROVIDE?
>
> It combines income from two sources:
>
> 1. benefits earned from 1976 on (see STEP ONE below), and
> 2. benefits preserved at the end of 1975, for those who were then in the plan (STEP TWO and STEP THREE).

If you enter the plan in 1976 or later, your calculation is easy.

STEP ONE. For each year of credited service from 1976 on, multiply that year's earnings by 1¼%. Then add the results for all the years from 1976 on to arrive at your annual retirement income (on a life income basis).

If you were in the plan before 1976, you will also have income based on the more favorable of the next two steps:

STEP TWO. For each year of credited service prior to January 1, 1968, you will receive an annual benefit equal to ¾ of 1% of the first $6,600 of your annual rate of basic earnings on January 1, 1968, plus 1¼% of such earnings in excess of $6,600.

For each year of credited service after January 1, 1968, you will receive an annual benefit equal to 1% of the first $6,600 of your annual rate of basic earnings on the November 1 immediately preceding that year, plus 1½% of such earnings in excess of $6,600.

STEP THREE. You will be entitled to a minimum monthly benefit equal to the greater of the following:

1. $5.00 a month for each year of credited service up to a maximum of 35 years.
2. 1¼% of your 1975 final average earnings, less 1.43% of your anticipated Social Security benefit, this total multiplied by your years of credited service through 1975 up to a maximum of 35 years.

STEP FOUR. Compare the results of STEP TWO and STEP THREE and select the larger. Add that to the result of STEP ONE, to find how much retirement income the base formula will give you (on a life income basis).

HOW ABOUT THE TEST FORMULA?

It exists to insure that your retirement income will reach

a level considered equitable for your service and earnings. Here's the way you calculate it:

STEP FIVE. Take 1½% of your final average earnings — that is, the average of your five highest paid years in the eleven years leading up to your retirement (including the year you retire). Multiply the result by your years of credited service, based on a one-year waiting period. This amount, which is limited to 60% of your final average earnings, will be "offset" by part of the Social Security benefit which has come from taxes paid by the company (STEP SIX).

STEP SIX. To figure the offset: If you will have less than 30 years of credited service when you reach 65, divide your actual credited service in years and months by 30, and multiply the result by half the annual primary Social Security benefit applicable to you at age 65. If you will have more than 30 years of credited service, divide your actual credited service at retirement by the credited service you will have if you work to age 65, and multiply the result by half your primary Social Security benefit at age 65. If you retire at 62 or later with at least 30 years of credited service, the offset is half the primary Social Security benefit to which you are entitled.

STEP SEVEN. Take the offset figured in STEP SIX from the result of STEP FIVE to see how much retirement income the test formula will give you (on a life income basis).

STEP EIGHT. Compare retirement income from the base formula (STEP FOUR) with retirement income from the test formula (STEP SEVEN). You will automatically receive the larger amount when you retire. Remember, this is shown on a life income basis.

17. Then in early 1982, Mead Corporation apparently changed the formula again when it included a breakdown of pension plan benefits, first mentioned in Paragraph 5, which

could not have been based on any of the above formulas. The Defendant did not include a formula of how the benefits were calculated.

18. On October 23, 1981, Mead amended the Pension Plan to allow two previous pension plans known as the Profit Sharing Trust and the Retirement Income Plan to be considered as offsets to the amount payable under the Mead Pension Plan.

19. At the termination of the plan, Mead distributes another formula which is based on the formula mentioned in Paragraph 16 but includes the two prior pension plans as offsets, and is set forth as follows:

MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN BENEFIT CALCULATION

BASE FORMULA

1) Multiply all earnings from 1976 to 6/28/83 by .0125.
2) Add the result of Step 1 to the Base Presumed benefit shown on the 01/01/82 pension record status form.

The result is your Annual benefit payable at age 65 under the Base Formula.

TEST FORMULA

1) Select the 5 highest years pay from 1973 to 1983 and average. The years selected and the average are shown on the benefit calculation sheet.
2) Multiply the average from step 1 by .015.
3) Multiply the result of step 2 by the actual Credited Service shown on the benefit calculation sheet.
4) Multiply the PIA (Primary Insurance Amount) from the benefit calculation sheet by 6. (The PIA is the projected age 65 Monthly Social Security benefit.)
5) Multiply the result of step 4 by the actual Credited Service shown on the calculation sheet and divide the answer by the potential service from the benefit calculation sheet.
6) Subtract the result of step 5 from the result of step 3.
7) Compare the result of step 6 with the Base Formula amount.

The greater of the Base Formula or Test Formula is your annual gross benefit payable at 65.

Check the Pension Record Status form and if you have any amount under offset 1, offset 2, or a Prior Frozen Benefit (check the Pension Record Status Form), subtract each from the greater of the Base or Test Amount.

The result is the annual benefit payable at 65. Divide by 12 to obtain the monthly amount.

20. Article V, Section 2(b) of the pension plan, attached as Exhibit A, allows a full retirement to all employees with 30 years or more service with Lynchburg Foundry Company. Five (5) of the six (6) Plaintiffs in this suit qualified for the early retirement age of sixty-two (62): B. E. Tilley, David H. Wall, Chrisley H. Reed, J. C. Weddle, and William D. Goode. B. E. Tilley was born on January 8, 1926, and began service with Lynchburg Foundry Company on June 2, 1947; David H. Wall was born on July 1, 1926, and started service in February of 1950; Chrisley H. Reed was born on March 18, 1925, and started service in October of 1951, J. C. Weddle was born on February 26, 1926, and began service on June 26, 1946; and William D. Goode was born on June 5, 1924, and began service on March 1, 1952.

21. The actuarial table used by the Defendant was as follows:

Age	Rate	Age	Rate
64	90.5%	59	57.4%
63	82.2%	58	52.8%
62	74.9%	57	48.6%
61	68.4%	56	44.9%
60	62.6%	55	41.5%

22. The pension plan is a defined benefit plan. After all liabilities were satisfied, the remaining funds were kept by the Defendant, The Mead Corporation. By figuring the retirement so that beneficiaries took less than the amounts promised in the breakdown of benefits mentioned in Paragraph 17, Mead Corporation profited substantially at the expense of the Plaintiffs.

COUNT I

23. By continuing to perform their jobs at Lynchburg Foundry Company, the Plaintiffs accepted the Defendant's unilateral January 1, 1982, offer and became entitled to the full amount of the contract sums stated in Exhibits B-1 through B-6.

24. WHEREFORE, the Plaintiffs respectfully move the Court for judgment against the Defendant, The Mead Corporation, for anticipatory breach of contract, both implied and express, and in favor of B. E. Tilley in the amount of $86,298.89; in favor of David H. Wall in the amount of $57,712.71; in favor of William L. Crotts, Jr. in the amount of $32,973.36; in favor of Chrisley H. Reed in the sum of $50,289.10; in favor of J. C. Weddle in the amount of $60,291.24; and in favor of William D. Goode in the amount of $57,243.28.

COUNT II

25. In the alternative to Count I above, the actions of the Defendant lead the Plaintiffs to reasonably believe that they were entitled to the higher benefits and caused them to rely to their detriment on the belief that they were entitled to greater pension benefits.

26. WHEREFORE, the Plaintiffs respectively move the Court for judgment against the Defendant, The Mead Corporation, under the theory of equitable estoppel, both implied and express, and in favor of B. E. Tilley in the amount of $86,298.89; in favor of David H. Wall in the amount of $57,712.71; in favor of William L. Crotts, Jr. in the amount

of $32,973.36; in favor of Chrisley H. Reed in the sum of $50,289.10; in favor of J. C. Weddle in the amount of $60,291.24; and in favor of William D. Goode in the amount of $57,243.28.

COUNT III

27. In the alternative to Counts I and II, the Defendant violated the Employee Retirement Income Security Act, 29 U.S.C.A. Sec. 1103(c), 1104(a)(1)(A) and 1106(b) by amending the Pension Plan on October 23, 1981, to allow the two prior pension plans to be considered as offsets to the amount of benefits due to each beneficiary, thus increasing the funds which were retained by Mead.

28. WHEREFORE, the Plaintiffs move this Court for judgment against the Defendant and in favor of B. E. Tilley for $15,000.00; in favor of David H. Wall for $15,000.00; in favor of William L. Crotts, Jr. for $15,000.00; in favor of Chrisley H. Reed for $15,000.00; in favor of J. C. Weddle for $15,000.00; in favor of William D. Goode for $15,000.00; and for all damages available to the Plaintiffs under 29 U.S.C.A. Sec. 1109(a), attorney's fees under 29 U.S.C.A. Sec. 1132(g) and punative damages.

COUNT IV

29. In addition to any of the above counts, the Plaintiffs move this Court for an accounting against the Defendant for all profits acquired by the Defendant during the seven (7) months which the pension plan funds were held after the termination of the pension plan under a theory of contructive trust in such amounts as will later be determined by an accounting of the Defendant's books.

COUNT V

30. In addition to any of the above counts, the Plaintiffs move this Court for judgment against the Defendant for violation of the Employee Retirement Income Security Act,

29 U.S.C.A. Sec. 1103(c), 1104(a)(1)(A), 1106(b) and 1344 for wrongfully withholding funds from the Plaintiffs which were due under the pension plan. The Plaintiffs pray for all damages available under 29 U.S.C.A. Sec. 1109(a), attorneys' fees under 29 U.S.C.A. Sec. 1132(g), and punative damages.

COUNT VI

31. In addition to any of the above counts, the Plaintiffs move this Court for judgment against the Defendant for violation of the Employee Retirement Income Security Act, 29 U.S.C.A. Sec. 1103(c), 1104(a)(1)(A), 1106(b) and 1344 for delaying the final payment of the pension plan benefits for seven (7) months during which time the Defendant enjoyed full control over these funds that did not include interest or an accounting of any profits from the use of these funds in their payment to the Plaintiffs. The Plaintiffs pray for all damages available under 29 U.S.C.A. Sec. 1109(a), attorneys' fees under 29 U.S.C.A. Sec. 1132(g) and punative damages.

COUNT VII

32. In addition to any of the above counts, the Plaintiffs move this Court for judgment against the Defendant for violation of the Employee Retirement Income Security Act, 29 U.S.C.A. Sec. 1104(a)(1)(A) for arbitrarily and capriciously discriminating in the treatment of beneficiaries under the administration and termination of the pension plan. The Plaintiffs pray for all damages available under 29 U.S.C.A. Sec. 1109(a), attorneys' fees under 29 U.S.C.A. Sec. 1132(g), and punative damages.

In addition to all of the above counts, the Plaintiffs pray for prejudgment interest from August 1, 1983, costs and attorneys' fees.

Respectfully submitted,

B. E. TILLEY, DAVID H. WALL,
WILLIAM L. CROTTS, JR.,
CHRISLEY H. REED, J. C.
WEDDLE, and WILLIAM D. GOODE

By: /s/ CLIFFORD L. HARRISON
Of Counsel

Clifford L. Harrison
Stone, Wall & Hamrick
P.O. Box 2968
Radford, Virginia 24143
Counsel for Plaintiffs

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

ATTACHMENT B-1

Name: B. E. Tilley　　　　Date: 01/12/82
Certificate No.: 70189

EQUITABLE

RETIREMENT ELECTIONS	AGE 56-02 04/01/82	AGE 62-00 02/01/88	AGE 65-00 02/01/91
LIFE ONLY INCOME	985.90	1,555.27	1,492.62
J&S OPTIONS			
1. RETIREE	883.17	1,356.04	1,281.86
½ TO SURVIVOR	441.59	678.02	640.93
2. RETIREE	853.59	1,300.67	1,224.55
⅔ TO SURVIVOR	569.09	867.16	816.41
3. RETIREE	839.40	1,274.39	1,197.38
¾ TO SURVIVOR	629.55	955.79	898.04
PERIOD(S) CERTAIN			
1. 5 YRS-RETIREE	977.03	1,528.83	1,455.30
2. 10 YRS-RETIREE	953.37	1,455.23	1,358.28
3. 15 YRS-RETIREE	916.89	1,354.64	1,234.40
CASH BALANCE OPTION			
RETIREE	922.80	1,401.30	1,309.03
GUARANTEE	147,894.86	201,485.23	176,621.72
LEVEL INCOME			
BEFORE 62	1,300.57	N/A	N/A
AFTER 62	752.17	N/A	N/A
UNTIL 62	N/A	N/A	N/A
INCREASING ANNUITY	713.79	1,189.78	1,168.72
LUMP SUM	124,402.05	173,407.63	153,830.61

ATTACHMENT B-2

Name: D. H. Wall　　　　Date: 01/12/82
Certificate No.: 70206

EQUITABLE

RETIREMENT ELECTIONS	AGE 55-09 04/01/82	AGE 62-00 07/01/88	AGE 65-00 07/01/91
LIFE ONLY INCOME	757.55	1,103.83	1,126.18
J&S OPTIONS			
1. RETIREE	678.61	962.43	967.16
½ TO SURVIVOR	339.31	481.22	483.58
2. RETIREE	655.89	923.13	923.92
⅔ TO SURVIVOR	437.28	615.45	615.98
3. RETIREE	644.98	904.48	903.42
¾ TO SURVIVOR	483.74	678.36	677.57
PERIOD(S) CERTAIN			
1. 5 YRS-RETIREE	750.23	1,085.06	1,098.03
2. 10 YRS-RETIREE	733.31	1,033.18	1,024.82
3. 15 YRS-RETIREE	706.79	961.44	931.35
CASH BALANCE OPTION			
RETIREE	710.58	994.55	987.66
GUARANTEE	114,670.34	143,001.18	133,260.88
LEVEL INCOME			
BEFORE 62	1,058.14	N/A	N/A
AFTER 62	546.94	N/A	N/A
UNTIL 62	N/A	N/A	N/A
INCREASING ANNUITY	551.12	844.43	881.80
LUMP SUM	96,304.00	123,073.51	116,065.01

ATTACHMENT B-3

Name: W. L. Crotts Jr. Date: 01/12/82
Certificate No.: 70257

EQUITABLE

RETIREMENT ELECTIONS	AGE 60-01 04/01/82	AGE 62-00 03/01/84	AGE 65-00 03/01/87
LIFE ONLY INCOME	824.03	840.67	1,168.46
J&S OPTIONS			
1. RETIREE	748.22	758.79	1,045.07
½ TO SURVIVOR	374.11	379.40	522.54
2. RETIREE	726.05	735.00	1,009.67
⅔ TO SURVIVOR	484.06	490.02	673.15
3. RETIREE	715.34	723.48	992.72
¾ TO SURVIVOR	536.51	542.61	744.54
PERIOD(S) CERTAIN			
1. 5 YRS-RETIREE	813.32	826.38	1,139.25
2. 10 YRS-RETIREE	782.00	786.87	1,063.30
3. 15 YRS-RETIREE	736.68	732.22	966.32
CASH BALANCE OPTION			
RETIREE	753.99	757.44	1,024.74
GUARANTEE	112,480.10	108,908.80	138,263.87
LEVEL INCOME			
BEFORE 62	1,214.72	N/A	N/A
AFTER 62	750.72	N/A	N/A
UNTIL 62	N/A	N/A	N/A
INCREASING ANNUITY	620.49	643.11	914.90
LUMP SUM	96,074.32	93,732.01	120,422.42

ATTACHMENT B-4

Name: C. H. Reed Date: 01/12/82
Certificate No.: 70225

EQUITABLE

RETIREMENT ELECTIONS	AGE 57-00 04/01/82	AGE 62-00 04/01/87	AGE 65-00 04/01/90
LIFE ONLY INCOME	731.47	1,078.04	1,103.64
J&S OPTIONS			
1. RETIREE	635.50	907.39	909.18
½ TO SURVIVOR	317.75	453.70	454.59
2. RETIREE	608.95	862.11	858.85
⅔ TO SURVIVOR	405.99	574.77	572.60
3. RETIREE	596.37	840.76	835.57
¾ TO SURVIVOR	447.28	630.57	626.68
PERIOD(S) CERTAIN			
1. 5 YRS-RETIREE	724.16	1,059.71	1,076.05
2. 10 YRS-RETIREE	705.14	1,009.05	1,004.31
3. 15 YRS-RETIREE	675.15	938.97	912.71
CASH BALANCE OPTION			
RETIREE	682.46	971.31	967.89
GUARANTEE	107,701.64	139,660.08	130,593.72
LEVEL INCOME			
BEFORE 62	1,064.80	N/A	N/A
AFTER 62	551.20	N/A	N/A
UNTIL 62	N/A	N/A	N/A
INCREASING ANNUITY	537.63	824.70	864.15
LUMP SUM	90,886.32	120,198.01	113,742.02

ATTACHMENT B-5

Name: J. C. Weddle　　Date: 01/12/82
Certificate No.: 70182

EQUITABLE

RETIREMENT ELECTIONS	AGE 56-01 04/01/82	AGE 62-00 03/01/88	AGE 65-00 03/01/91
LIFE ONLY INCOME	600.46	982.99	909.35
J&S OPTIONS			
1. RETIREE	537.89	857.07	780.95
½ TO SURVIVOR	268.95	428.54	390.48
2. RETIREE	519.88	822.07	746.03
⅔ TO SURVIVOR	346.60	548.07	497.38
3. RETIREE	511.23	805.46	729.48
¾ TO SURVIVOR	383.42	604.10	547.11
PERIOD(S) CERTAIN			
1. 5 YRS-RETIREE	595.06	966.28	886.62
2. 10 YRS-RETIREE	580.64	920.08	827.51
3. 15 YRS-RETIREE	558.43	856.18	752.03
CASH BALANCE OPTION			
RETIREE	562.03	885.67	797.50
GUARANTEE	90,237.13	127,346.35	107,603.39
LEVEL INCOME			
BEFORE 62	895.21	N/A	N/A
AFTER 62	406.41	N/A	N/A
UNTIL 62	N/A	N/A	N/A
INCREASING ANNUITY	438.04	751.99	712.02
LUMP SUM	75,882.05	109,600.24	93,718.34

ATTACHMENT B-6

Name: W. D. Goode　　Date: 01/12/82
Certificate No.: 70234

EQUITABLE

RETIREMENT ELECTIONS	AGE 57-09 04/01/82	AGE 62-00 07/01/86	AGE 65-00 07/01/89
LIFE ONLY INCOME	882.71	1,266.11	1,329.01
J&S OPTIONS			
1. RETIREE	779.61	1,096.07	1,131.92
½ TO SURVIVOR	389.81	548.04	565.96
2. RETIREE	750.57	1,049.35	1,078.76
⅔ TO SURVIVOR	500.41	699.60	719.21
3. RETIREE	736.62	1,027.20	1,053.77
¾ TO SURVIVOR	552.47	770.40	790.33
PERIOD(S) CERTAIN			
1. 5 YRS-RETIREE	873.00	1,244.59	1,295.78
2. 10 YRS-RETIREE	848.28	1,185.08	1,209.40
3. 15 YRS-RETIREE	809.45	1,102.78	1,099.09
CASH BALANCE OPTION			
RETIREE	820.92	1,140.77	1,165.54
GUARANTEE	127,710.48	164,024.55	157,261.75
LEVEL INCOME			
BEFORE 62	1,207.29	N/A	N/A
AFTER 62	736.89	N/A	N/A
UNTIL 62	N/A	N/A	N/A
INCREASING ANNUITY	648.79	968.57	1,040.61
LUMP SUM	108,090.31	141,167.21	136,968.83

THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

TABLE OF CONTENTS

THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

(Revised and restated effective as of January 1, 1976)

ARTICLE I

DEFINITIONS

The following words and phrases, when used in this Plan, unless the context clearly indicates otherwise, shall have the following meanings:

Section 1. Plan. The Mead Industrial Products Salaried Retirement Plan, the terms of which are herein set forth, revised effective as of January 1, 1976, and as it may be amended from time to time. This Plan amends, and continues as so amended, the Woodward Company Salaried Employees' Retirement Income Plan, which first became effective as of January 1, 1968, and all other Pre-existing Plans.

Section 2. Effective Date. January 1, 1976.

Section 3. Pre-existing Plan. Any retirement plan or profit sharing plan of an Employing Company or a Related Employer in effect immediately prior to the Effective Date, as to any group or unit of employees.

Section 4. Corporation. The Mead Corporation, an Ohio corporation.

Section 5. Board of Directors. The Board of Directors of the Corporation.

Section 6. Employing Company. The Mead Industrial Products Division, any subsidiary, division or company affiliated with The Mead Corporation which may, from time to time, be designated as an Employing Company by the Corporate Benefits Committee, and which shall have adopted the Plan by such resolutions and certifications, by the obtaining of such consents from trustees, committees and others and by such other steps as are necessary effectively to adopt this Plan or a Pre-existing Plan.

Section 7. Related Employer. Any division, firm or corporation, other than an Employing Company, in which an Employing Company or Companies own a substantial interest and which has been determined by the Administrative Committee to be a Related Employer.

Section 8. Employee. A regular, full-time employee of an Employing Company, wherever employed, as determined by the Employing Company under its normal practices, who is not accruing Credited Service under any other retirement plan to which the Corporation makes contributions; a former employee of an Employing Company, who has been transferred to a Related Employer, unless the transferred employee shall waive his rights to future service benefits under the Plan; or a person who is on Approved Absence and who was such an employee immediately prior to such Approved Absence.

Section 9. Approved Absence. Absence of an Employee (i) authorized or approved by his Employing Company, or (ii) while in the employ of a Related Employer pursuant to transfer from an Employing Company, or (iii) during layoff or furlough while recall rights continue (as determined in accordance with the normal practices of his Employing Company); or (iv) who returns to employment within twelve (12)

months of his termination of service; or (v) for the period of the absence of an Employee due to service with the armed services of the United States, expiring concurrently with reemployment or with the expiration of any reemployment right provided by law, whichever is the earlier.

Section 10. Participant. An Employee who has met all of the requirements of this Plan, has become included in this Plan as provided in Article II and who continues to have rights or contingent rights to benefits payable under this Plan.

Section 11. Earnings.

(a) For Years After December 31, 1975:
The amounts paid by an Employing Company to an Employee, amounts paid by a Related Employer to a former Employee of an Employing Company now employed by a Related Employer and amounts paid by a Related Employer to a current Employee prior to his transfer to an Employing Company, for services, excluding:

(i) Gifts.

(ii) Credits, awards and payments under any incentive or bonus plan, except as otherwise determined by the Administrative Committee.

(iii) Deferred compensation.

(iv) Special payment authorized by the Directors.

(b) For Years Prior to January 1, 1976:
The basic compensation rate paid to a Participant by an Employing Compnay, or a Related Employer, on November 1st of the preceding plan year, excluding all payments for overtime, bonuses, and other forms of premium or special incentive pay, and Company contributions, or the contributions of any Related Employer, to this or any other employee benefit plan. However, Earnings for the purpose of determining benefits for service prior to January 1, 1968 hereunder shall mean a Participant's basic compensation rate as of January 1, 1968.

Section 12. Final-Average Earnings.

(a) Years Prior to January 1, 1976.
The average annual Earnings of a Participant during the five (5) consecutive calendar years in which his Earnings have been highest, selected from the last ten (10) or less years of his continuous employment as a Participant with an Employing Company or a Related Employer before January 1, 1976.

(b) For Minimum Retirement Income.
For purposes of determining Minimum Retirement Income under Section 3 of Article V, the average annual Earnings of a Participant during the five (5) calendar years in which his Earnings have been highest, selected from the last eleven (11) years (including his year of retirement) of his continuous employment as a Participant with an Employing Company or a Related Employer before his early or normal retirement date or date of termination of employment with a vested benefit.

(c) Determination.
In the event that an Employee has less than five (5) years of such continuous employment, the Final Average Earnings shall be the average of all complete calendar years. For the purposes of Section 12(a) herein, in event that a Participant has less than one full year of continuous employment, Final Average Earnings will be based on the January 1, 1976 Earnings on an annualized basis.

Section 13. Vesting Date. The date on which a Participant shall have completed at least ten (10) years of Qualifying Service.

Section 14. Credited Interest. Interest credited under the pre-existing plan and continued after the effective date pursuant to the terms of the pre-existing plan as may be determined from time to time by the Corporate Benefits Committee.

Section 15. Primary Social Security Benefit. The primary insurance amount to which a retired Employee

would be entitled, if he made timely and proper application and if he did not engage in disqualifying employment under the Federal Social Security Act, as projected to the Employee's Normal Retirement date and computed as though the employee had been covered by the Federal Social Security Act throughout his service with an Employing Company.

Section 16. Totally and Permanently Disabled. Disabled as a result of demonstrable injury or disease which will permanently, continuously and wholly prevent the Participant from engaging in any occupation or performing any work for remuneration or profit; provided that this term shall not include any injury or disease which (i) was contracted, suffered or incurred while the Participant was engaged in, or resulted from his having engaged in, a criminal enterprise, or (ii) was intentionally self-inflicted, or (iii) arose out of service in the armed forces of any country, or (iv) arose as a result of or while working for an employer other than an Employing Company or a Related Employer.

Section 17. Actuary. An independent qualified actuary, who is a member of the Society of Actuaries, or a firm of independent actuaries at least one of whose actuaries is a member of the Society of Actuaries, selected by the Administrative Committee. In addition, commencing January 1, 1976, it means an Actuary enrolled under Title III, Subtitle C of the Employee Retirement Income Security Act of 1974.

Section 18. Administrative Committee. The Administrative Committee provided for in Article XI of this Plan.

Section 19. Corporate Benefits Committee. The Mead Corporate Benefits Committee provided for in Article XI of this Plan.

Section 20. Retirement Fund. The fund described in Article XII.

Section 21. Qualifying Service. All service as a regular full-time employee, which shall not have terminated as defined in Section 5 of Article III, including time on an Approved Absence.

For a full-time employee, Qualifying Service shall commence on the initial date of employment of an Employee and shall cease upon termination of employment.

For part-time or seasonal employees, Qualifying Service shall commence on the first day of the first period of twelve (12) consecutive months in which the employee accumulates 1,000 or more Hours of Service. Thereafter, the part-time or seasonal employee shall be treated as a full-time employee.

Section 22. Actuarial Equivalent. A benefit equal in value, as of the effective date of determination to the benefit for which it is substituted, the value of both such benefits being computed on the basis of actuarial assumptions, tables and factors adopted by the Administrative Committee for such use under the Plan on the recommendation of the Actuary.

Section 23. Hour of Service. Each employee will be credited with an hour of service for:

(a) Each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for the performance of duties. These hours shall be credited to the employee for the computation period or periods in which the duties are performed; and

(b) Each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for reasons (such as vacation, sickness or disability) other than for the performance of duties. These hours shall be credited to the employee for the computation period or periods in which payment is made or amounts payable to the employee become due; and

(c) Each hour for which back pay, irrespective of mitigation of damage, has been either awarded or agreed to by the employer. These hours shall be credited to the employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement, or payment was made.

Section 24. Year of Service. A Year of Service shall mean any consecutive period of twelve months.

Section 25. Plan Year. The accounting year of the Corporation, that is the twelve month period ending on December 31 of each year.

ARTICLE II

CLASSES OF BENEFITS PROVIDED; ELIGIBILITY; CONDITIONS TO PARTICIPATION

Section 1. Classes of Benefits Provided. This Plan provides for the payment of:

(a) Retirement benefits to each Participant who at the time of his retirement qualifies for such benefits, as provided in Article IV;

(b) Benefits on disability to certain classes of Participants, as provided in Article VI;

(c) Benefits to certain classes of Participants on death, as provided in Article VII; and

(d) Benefits to certain classes of Participants on termination of service, as provided in Article VIII;

Section 2. Eligibility for Participation.

(a) Each Employee, who shall have been included in a Pre-existing Plan immediately before the Effective Date applicable to such Employee, shall be eligible to be included in this Plan as of such date, and shall automatically be included in this Plan as a Participant as of such date (subject to the provisions of Section 3 of this Article, and the provisions of Article V), unless within 30 days after such effective date (or such other period as shall be determined by the Administrative Committee) he shall notify his Employing Company to the effect that he elects not to be so included. Any employee who so notifies his Employing Company shall thereafter be eligible to enter this Plan only to the extent that he meets the requirements set forth in Subsection (b) below.

(b) Each person (i) who shall be an Employee, and (ii)

who shall have completed at least one year of Qualifying Service on or after the Effective Date applicable to him, shall thereupon be eligible to become a Participant, and shall continue to be eligible so long as he meets such requirements.

(c) Notwithstanding the foregoing paragraphs (a) and (b), any managerial Employee who, because of special arrangements outside of the terms of any retirement plan, shall be deemed by the Corporate Benefits Committee to be ineligible for inclusion in this Plan, shall be excluded from the Plan.

(d) An employee of an Employing Company, who was transferred from a Related Employer, shall be ineligible for inclusion in this Plan, if he continues to accrue Credited Service under the terms of any other qualified retirement plan maintained by the Related Employer.

Section 3. Conditions to Participation. Participation in this Plan by any eligible employee shall be contingent upon receipt by his Employing Company of such consents, proofs of birth, elections, beneficiary designations, and other information as shall be prescribed by the Administrative Committee. For this purpose, any such consents, proofs of birth, elections, beneficiary designations, or other documents or information previously furnished by an Employee in connection with a Pre-existing Plan, shall be accepted by the Administrative Committee for the purpose of this Plan, if, in its judgment, they are sufficient and proper, and the rights of the Employee are not impaired thereby. Each eligible Employee shall have 30 days, or such additional time as may be determined to be appropriate, from his date of eligibility in which to elect not to become a Participant.

ARTICLE III

CREDITED SERVICE; APPROVED ABSENCE DISABILITY; TERMINATION OF SERVICE

Section 1. Continuous Employment. Continuous employment shall be deemed to be service as an Employee

(including service with two or more Employing Companies and service with a Related Employer by a former Employee of an Employing Company and former service with any Related Employer by a current Employee), which shall not have terminated as defined in Section 5 of this Article III.

Section 2. Credited Service. Subject to the succeeding sections of this Article, Credited Service shall be the total number of years and completed months of Past Service and Future Service.

(a) "Past Service" shall be the continuous employment of an Employee prior to January 1, 1976 except that the Past Service of an Employee of the Murray Rubber Division shall commence upon January 1, 1968 or his entry into this Plan, whichever shall occur later.

(b) "Future Service" shall be the continuous employment of an Employee after December 31, 1976 after he becomes eligible for participation in the Plan.

Section 3. Service after Normal Retirement Date. No Qualifying, Past or Future Service shall be credited under this Plan with respect to employment after the attainment of an Employee's Normal Retirement Date.

Section 4. Approved Absence. For the purpose of this Plan, Credited Service shall be preserved during Approved Absence, but any calendar year, after the applicable effective date during the entirety of which an employee is on such Approved Absence and as to which no earnings are payable to the employee shall not be credited for purposes of this Plan, except that any employee who is on Approved Absence because of service in the armed forces of the United States will receive Credited Service without any Earnings for the period of his service in the armed forces. The Credited Service of any Participant who transfers to a Related Employer shall be preserved only to the extent that it shall not result in any duplicate coverage, as determined in accordance with regulation of the Administrative Committee.

Section 5. Termination of Service. Subject to the provisions of Article VIII continuous employment shall be deemed

to be broken, and all Credited Service previously accumulated shall be forfeited (unless otherwise determined in accordance with normal practices of the Employing Company or as provided under Section 9 of Article I and Section 6 of Article III) in the event of:

(a) Voluntary or involuntary separation (unless such separation occurs upon transfer from one Employing Company to another or to a Related Employer, or unless, in a case covered by Section 5 (b) of Article XIII, the Corporation elects to apply the provisions of that Section) or

(b) Failure to return to work on expiration of Approved Absence or discontinuance of disability.

Section 6. Reemployment. Upon the reemployment of a Participant, who was terminated without any vested benefit by an Employing Company or a Related Employer, the Participant shall receive Credited Service (a) for continuous employment prior to his termination of employment, if the period of his break in employment is less than the period of employment prior to the break or (b) for the period of the break in employment, if the Participant is reemployed within the twelve (12) month period subsequent to the date of termination of employment.

Upon the reemployment of a Participant who had terminated with a vested deferred benefit, the Participant shall receive Credited Service for any year in which he had Earnings.

Section 7. Limitation on Past Service. No Past Service shall be credited to any Employee who has voluntarily failed to participate (or waived his right to participate) in this or a Pre-existing Plan.

ARTICLE IV

RETIREMENT

Section 1. Normal Retirement.

(a) Each Participant who retires in accordance with the provisions of this Section 1 shall thereupon become

eligible to receive a normal retirement income payable in an amount as provided in Article V.

(b) The Normal Retirement Date of each Participant shall be the first day of the month coincident with or next following his sixty-fifth (65th) birthday.

(c) Each Participant who shall not have retired early shall be retired automatically on his Normal Retirement Date, except that his active employment with an Employing Company may be continued on a year-to-year or other basis at the request of the Employing Company and with the consent of the Participant and the Administrative Committee, but in no event beyond age sixty-eight (68).

Section 2. Early Retirement. After he attains age fifty-five (55) and until he attains age sixty-five (65), a Participant shall have the right to elect an Early Retirement Date by giving written notice of such Early Retirement Date at least thirty (30) days in advance to his Employing Company, and, in such event, the Participant shall receive a retirement income in an amount determined under Article V, commencing on the first day of the month coincident with or next succeeding such Early Retirement Date.

ARTICLE V

AMOUNT OF RETIREMENT INCOME; EMPLOYEE CONTRIBUTIONS

Section 1. Amount of Retirement Income.

A Participant who retires at or after his normal retirement date shall be entitled to a retirement income for life payable monthly equal to the greater of the amounts specified in Paragraphs (a) or (b) for all years prior to January 1, 1976, plus the amount specified in Paragraph (c) for all years after December 31, 1975, as follows:

(a) An annual amount equal to (i) for years prior to January 1, 1968, for each year of Credited Past Service an amount equal to .75% of the first $6,600.00 of Earnings plus an amount equal to 1.25% of Earnings in excess of

$6,600.00 plus (ii) for each year of Credited Service subsequent to December 31, 1967, but prior to January 1, 1976, an amount equal to 1% of the first $6,600.00 of Earnings and an amount equal to 1.5% of Earnings in excess of $6,600.00; or

(b) An annual amount equal to the greater of (i) $60.00 multiplied by years of Credited Past Service up to a maximum of thirty-five (35) years with proportionate allowance for completed months or (ii) an annual amount which, including the Primary Social Security Benefits provided under Section 1(d) of this Article, is equal to 1.25% of Final Average Earnings as defined in Section 12(a) of Article I, as of January 1, 1976 multiplied by years of Credited Past Service, with proportionate allowance for completed months, up to a maximum of thirty-five (35) years.

(c) For years after December 31, 1975, an annual amount equal to 1¼% of total annual Earnings subsequent to December 31, 1975.

(d) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to one and forty-three/one hundredths percent (1.43%) times years of Credited Past Service with proportionate allowance for completed months, up to a maximum of thirty (30) years by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at the date of his retirement or termination of employment.

Section 2. Early Retirement Income.

(a) A Participant who elects an Early Retirement Date shall be entitled to a retirement income for life, payable monthly, in an annual amount which is equal to the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date reduced by one-twelfth (1/12) of five percent (5%) for each month by which his Early Retirement Date precedes the first day of the month coincident with or next following the date on which he attains age sixty-five (65).

(b) If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits.

Section 3. Minimum Retirement Income.

(a) The minimum monthly retirement income payable to a Participant (in cases of normal retirement, early retirement or late retirement) shall be the greater of (i) an annual amount which, including a percentage of the Primary Social Security Benefit applicable to him as defined in paragraph (b) of this Section, shall be equal to (A) 1½% of his Final Average Earnings, as defined in Section 12(b) of Article I, multiplied by the number of years of his Past Service with proportionate allowance for completed months, plus (B) 1½% of his Final Average Earnings, as defined in Section 12(b) of Article I, multiplied by the number of years of his Future Service with proportionate allowance for completed months or (ii) an amount equal to twenty dollars ($20.00) per month plus an additional four dollars ($4.00) per month for each full year of Credited Service in excess of five (5) full years of Credited Service.

(b) The Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be determined by multiplying (i) a factor equal to a fraction the numerator of which is the total years of Credited Service of a Participant at his retirement with proportionate allowance for completed months or termination of service and the denominator of which is the greater of (A) thirty (30) years or (B) potential years of Credited Service at Normal Retirement Age with proportionate allowance for completed months times (ii) fifty percent (50%) of the Primary Social Security Benefit to which the employee would be entitled on his Normal Retirement Date, unless the employee has thirty (30) or more Years of Credited Service or was a participant in the pre-existing Murray Rubber Co. Salaried Retirement Plan and has 30 years of continuous employment after the date when he shall have completed one year

of continuous employment, and has attained at least age sixty-two (62) in which case the Primary Social Security Benefit applicable to a Participant under Paragraph (a) of this Section shall be 50% of the actual, annual, reduced, early retirement Primary Social Security Benefit to which the employee would be entitled.

Section 4. Maximum Retirement Income. The maximum retirement income payable to a Participant under this Plan shall not exceed the lesser of (i) Seventy-five Thousand Dollars ($75,000) per year, or such other amount as the Secretary of Labor by appropriate regulation shall determine from time to time, (ii) Seventy-five Percent (75%) of the Participant's average compensation for the highest three consecutive calendar years during which he was a Participant, or (iii) sixty percent (60%) of his Final Average Earnings, as defined in Section 12(b) of Article I, including one-half of his Primary Social Security Benefit, as determined under Section 3(a) of this Article.

Section 5. Relationship to Retirement Income under Pre-existing Plan. The amount of retirement income determined as in Section 1 of this Article V, shall be inclusive of, and shall in no event be less than the Actuarial Equivalent of any retirement benefit, profit sharing balance or other vested cash interest of a Participant which shall have accrued to the credit of the Participant under any Pre-existing Plans in respect of service prior to becoming included in this Plan, except for former participants in the Murray Rubber Company Salaried Retirement Plan in which case the Pre-existing Plan benefits shall be in addition to the benefits under this Plan.

Section 6. Withdrawal of Contributions. A Participant who has made contributions in accordance with the provisions of this Plan may withdraw his contributions at the time of the termination of his employment and his accrued benefits, will be actuarilly reduced in an amount determined under regulations issued from time to time by the Secretary of Labor.

Section 7. Increases in Social Security. The retirement income of retired Participants and their Beneficiaries and terminated employees with vested interests shall not be reduced because of any changes in benefit levels or wage levels under the Social Security Act.

ARTICLE VI

DISABILITY RETIREMENT

Section 1. Disability Retirement Income. If a Participant shall become Totally and Permanently Disabled after the Effective Date applicable to him, he shall be entitled to receive a Disability Retirement Income, payable monthly, based on his Credited Service at the time he became Totally and Permanently Disabled determined as follows:

Years of Credited Service	Monthly Disability Income
10 years or less	$60.00
11 years	66.00
12	72.00
13	78.00
14	84.00
15	90.00
16	96.00
17	102.00
18	108.00
19	114.00
or more years	120.00

Section 2. Determination of Disability. In determining whether or not a Participant is Totally and Permanently Disabled, the Administrative Committee may require such Participant to submit himself to a physical examination at any reasonable time or times by one or more physicians approved by the Administrative Committee. Refusal to submit to any such physical examination shall be deemed to constitute recovery from disability for the purposes of this Plan.

Section 3. Waiver of Disability Income.

(a) A Participant may elect not to receive the Disability

Retirement Income provided under this Article. A Participant making such election shall, during the effective period of the election, be ineligible to receive the Disability Retirement Income provided under this Article and shall also be ineligible to receive any form of early retirement income under Section 2 of Article V. If a Participant who has made such an election becomes Totally Disabled he shall be treated for purposes of the Plan as though he continued throughout the period of disability to be actively employed at the same rate of earnings as that rate in effect at the time of his becoming disabled, and shall, upon attaining his normal retirement date, become eligible to receive a normal retirement income in accordance with the provisions of Section 1 of Article V. During the effective period of such election the Participant shall be eligible to make an election of the special joint and survivor annuity set forth in Section 5 of Article IX. "Totally Disabled" means continuously and wholly disabled, as determined by the Administrative Committee, provided, however, that the determination of such disability shall be fully subject to the same procedures as Section 2 of Article VI.

(b) The election described in this Section shall be made by an instrument in writing delivered to the Administrative Committee prior to the Participant's commencing to receive any form of retirement income, and may be revoked by an instrument in writing delivered to the Administrative Committee, but no election or revocation shall have any retroactive effect.

Section 4. Limitations.

(a) The Disability Retirement Income provided in this Article shall be in lieu of all other retirement income except as expressly otherwise provided in Section 3 of Article X.

(b) In no event shall the Disability Benefit provided under this Article be payable for any period, prior to the Participant's attaining his Normal Retirement Date, in which wages or salary are payable to him from any source.

(c) The Disability Retirement Income provided under

this Article shall be payable only so long as the Participant is Totally and Permanently Disabled, unless recovery from disability occurs subsequent to attainment of his Early or Normal Retirement Date, in which case such Disability Retirement Income shall continue for life.

Section 5. Relationship to Disability Income Under Pre-existing Plan. The amount of Disability Income determined as in Section 1 of this Article VI, shall be inclusive of, and shall in no event be less than the Actuarial Equivalent of any disability benefit which shall have accrued to the credit of the Participant in respect of service prior to becoming included in this Plan under any Pre-existing Plans.

ARTICLE VII

BENEFITS ON DEATH

Section 1. Death During Active Service. In the event of the death of a Participant prior to termination of service or retirement, there shall be no death benefit payable under this Plan, other than the special election of a joint and survivor annuity under Section 5 of Article IX.

Section 2. Death after Retirement or Termination of Service. In the event of the death of a Participant after his retirement or termination of his service, no death benefit shall be payable under this Plan, except as may be provided by the Participant under an optional form of retirement income.

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE

Section 1. Vested Deferred Retirement Income. A Participant who has reached his Vesting Date, and whose service terminates for any reason other than death or retirement, shall receive a retirement income, commencing at age 65, in an amount determined on the basis of his Credited Service up to the date of his termination of employment.

Section 2. Vested Deferred Early Retirement. A Participant who is entitled to a vested deferred retirement income commencing at age 65, as provided above, may elect to receive instead a reduced retirement income of an Actuarial Equivalent value commencing at an earlier date, but no earlier than age 55.

Section 3. Pre-existing Plan Accounts. If a terminated Participant has an account under any Pre-existing Plan, his right of withdrawal of that account, if any, shall be governed by the terms of the Pre-existing Plan.

Section 4. Application. Application for Vested Deferred Retirement Income must be made to the Administrative Committee by an applicant otherwise eligible therefor not earlier than 90 days prior to the date retirement income is to commence. The monthly retirement benefit shall become payable to such employee after (i) the date retirement income is to commence, and (ii) he shall have filed a timely application for such benefit with the Administrative Committee.

ARTICLE IX

NORMAL AND OPTIONAL FORMS OF RETIREMENT INCOME

Section 1. Normal Form of Retirement Income. The normal form of retirement income payable to a Participant under this Plan shall be an annuity payable monthly for life.

Section 2. Retirement Income for Married Participant. Unless he elects otherwise by written request to the Administrative Committee prior to his Normal or Early Retirement Date, whichever is applicable, a married Participant shall receive a retirement income reduced from the normal form of retirement income. Such retirement income shall be payable during his lifetime, with a survivor's annuity to continue after his death at the rate of 50% of the reduced retirement income to his spouse at the time benefit payments commence. The amount of the retirement income shall be determined by applying the appropriate Actuarial Equivalent factor to the normal form of retirement income. Such Actuarial Equivalent factor shall be based on the age of the Participant and his spouse.

Section 3. Optional Forms of Retirement Income. In lieu of the normal form of retirement income payable to a Participant under the terms of this Plan, such Participant may elect to receive an annuity of actuarially equivalent value in any one of the following forms:

(a) A joint and survivor annuity, in a reduced amount, to continue during the lifetime of the retired Participant, and further to continue after his death at three-quarters, two-thirds, or one-half rate (according to the election of the Participant) to a surviving spouse or other designated beneficiary, during the lifetime of such person after the death of the retired Participant;

(b) A joint and survivor annuity, in a reduced amount, to continue during the lifetime of the Participant and further to continue after his death at three-quarters, two-thirds, or one-half rate (according to the election of the Participant) to a beneficiary who is a minor lineal descendant until such person attains age 21 if such event occurs after the death of the retired Participant;

(c) A reduced annuity payable during the lifetime of the retired Participant and guaranteed to continue to the retired Participant or to a designated beneficiary or to the estate of the last to die of the retired Participant and the beneficiary, for at least 5, 10 or 15 years (according to the election of the Participant) after the retirement of the Participant regardless of whether the Participant survives such 5, 10 or 15 year period;

(d) A reduced annuity payable during the lifetime of the retired Participant plus a benefit payable on his death in an amount equal to the full actuarial value of such reduced annuity, less any retirement income payments (including any disability payments) made to the Participant prior to his death.

(e) An annuity in an Actuarial Equivalent payable in

some other form, excluding all lump sum distributions, provided that such annuity is judged by the Administrative Committee to be in the best interests of the retiring Participant, and provided further that the Participant is able to comply with such requirements as may be prescribed by the Administrative Committee for the purpose of determining its action on his election.

(f) A reduced annuity payable during the lifetime of the Participant, which shall increase at the rate of Three Percent (3%) per year on the anniversary of the Participant's actual retirement.

(g) Social Security Adjustment Option: A Participant who has retired early under the provisions of Section 2 of Article IV, or an individual beneficiary under a joint and survivor annuity option who becomes entitled before becoming eligible for Social Security benefits to enter upon an annuity payable under this Plan, may elect to receive such benefit in the form of an adjusted annuity payable in a greater amount during the period before becoming eligible for Social Security benefits and a correspondingly reduced amount, actuarially determined, after becoming so eligible, so that the total income, including both the adjusted benefit payable under this Plan and the Primary Social Security Benefit to which such person shall be entitled, shall be as nearly uniform as possible both before and after becoming so eligible.

Section 4. Conditions Relative to Optional Forms of Retirement Income.

(a) (i) To become effective, an election of an optional form of retirement income (other than optional forms under Sections 3(e) and 5 of this Article) must have been made either within thirty (30) days following the Effective Date of this Plan or at least thirty (30) days before the Normal Retirement Date or earlier actual retirement of the Participant, provided that he may elect an optional form of retirement income or change his beneficiary at any time prior to his retirement if the Participant shall furnish evidence of good health satisfactory to the Administrative Committee, provided that a Participant who is retired involuntarily prior to his normal retirement date, may exercise his election of an optional form of retirement income at any time prior to his actual retirement;

(ii) To become effective, an election of an optional form of retirement income, as described in Sections 3(e) and 5 of this Article must have been made either within one year following the Effective Date of this Plan or at least one year before the Normal Retirement Date or earlier actual retirement of the Participant, subject to the additional provisions of Paragraph (i) of this Section 4(a).

(b) Any beneficiary designated under this Article must be a natural person.

(c) To elect a joint and survivor annuity (or to change the beneficiary) a Participant shall designate his beneficary on a form provided for the purpose, and shall furnish to the Administrative Committee not later than the date on which he shall retire, proof satisfactory to the Administrative Committee of the age of the beneficiary.

(d) The election of an optional form of retirement income shall become effective at his Normal Retirement Date (regardless of whether the Participant continues in active employment after such date), or upon his earlier actual retirement.

(e) A Participant may, in hardship cases subject to the consent of the Administrative Committee, revoke his election of an optional form of retirement income at any time before it shall have become effective as provided in Subsection (d) above.

(f) If a Participant shall have elected an optional form of benefit which provides for designation of a beneficiary and

(i) If his beneficiary shall die before the election becomes effective, the election shall thereupon become void;

(ii) If the Participant shall die before the election

becomes effective, the election shall thereupon become void and the beneficiary shall not be entitled to an annuity under such option;

(iii) If the Participant shall remain in the active service of an Employing Company or become reemployed by an Employing Company after the date upon which the election becomes effective, his election shall nevertheless continue to be effective, and if the Participant shall die before retiring, his beneficiary shall receive the amount of annuity which would be payable to such beneficiary in accordance with such election, as if such Participant had retired on the date of his death, and if the beneficiary shall die before the Participant shall actually retire, such Participant shall be entitled, after retiring, to receive only the reduced annuity payable to him in accordance with such election;

(iv) If the beneficiary shall die after commencement of the optional annuity, but before the death of the retired Participant, such Participant shall continue to receive the reduced annuity payable to him in accordance with such election.

(g) In the election of any optional form of retirement income, the Participant may designate any person or persons, natural or corporate, as trustee or otherwise, as a payee beneficiary, to receive payments of benefits in lieu of payment to the natural person designated as beneficiary.

Section 5. Special Joint and Survivor Annuity. A special election of joint and survivor annuity may be made, as set forth in this paragraph. If such a special election of a joint and survivor annuity shall have been made by a Participant at least one year before his death and he shall die after attainment of age 55 and before attainment of Normal Retirement Date or earlier termination of his employment, for the purpose of this paragraph alone he shall be deemed to have retired early as of the first day of the month coincident with or immediately prior to the date of his death. The election of the joint and survivor annuity shall thereupon become effective and his beneficiary shall be entitled to receive an income based upon the actuarially reduced income to which the Participant would have been entitled upon such early retirement, further reduced in recognition of the substitution of a joint and survivor annuity for an annuity based on the life of the Participant only and further reduced by the cost of the coverage under this Section 5 as provided herein. In the event that a Participant who has made such a special election survives until he retires (whether or not his beneficiary dies before he retires), the retirement income subsequently payable to him shall be reduced actuarially in consideration of the coverage which he shall have received under this provision as follows:

Proportion of Reduced Retirement Income to be Paid to Beneficiary Under Option Elected	Percentage Reduction in Retirement Income of Participant for Each Full Year of Coverage (with Pro Rata Reduction for Completed Months)
1/2	1/2 of 1%
2/3	2/3 of 1%
3/4	3/4 of 1%

This election will be given effect prior to the completion of the one (1) year election period if: (a) Participant dies from accidental causes; (b) a failure to give effect to the election would deprive the survivor of the Participant of an annuity; (c) the election was made before the accident, and (d) the Participant at the time of the accident had arrived at his Early Retirement Date.

ARTICLE X

PAYMENT OF BENEFITS; CLAIMS PROCEDURE

Section 1. Authorization of Payment; Application; Appellate Procedure.

(a) No payments shall be made under this Plan until it

shall have been authorized by the Administrative Committee.

(b) All claims for benefits shall be in writing, signed by the Participant or, if applicable, his beneficiary and filed with the Administrative Committee, through a local Plan Representative as appropriate, on forms furnished and approved by the Administrative Committee. The Administrative Committee and the Plan Representative shall follow the following procedure in processing claims:

(i) Advise the Claimant of all his rights under the Plan and assist him in the preparation of the claim;

(ii) If filed through a Plan Representative, the Plan Representative shall forward the executed claim within thirty (30) days of receipt of the initial application to the Administrative Committee for its consideration.

(iii) The Administrative Committee shall meet monthly to consider and take action on all claims received since it last met;

(iv) Upon approval of a claim by the Administrative Committee, a member of the Committee shall take prompt action to commence payment of benefits to the Claimant in accordance with the provisions of the Plan.

(c) In the event that any claim is denied by the Administrative Committee, the claimant shall have the right within a period of sixty (60) days from the receipt of notice of denial to appeal such denial to a Panel of three persons, designated by The Corporate Benefits Committee to hear the appeal within sixty (60) days after the date the appeal was filed. The appeal shall be filed in writing with the Administrative Committee.

The Claimant shall be entitled to appear before the panel in person to present his claim and the Panel shall have the authority to obtain such additional evidence as it deems appropriate under the circumstances to enable it to render a decision.

The decision of the Hearing Panel shall be rendered in writing to the Claimant within seven (7) days of the completion of the hearing and shall be binding upon the Company and the Claimant to the extent permitted by law.

Section 2. Date and Duration of Payment. The retirement income payable under this Plan to a retired Participant shall commence, if he shall then be living, and if in accordance with the provisions of this Plan, as of the first day of the month coincident with or next following the latest of:

(i) The actual retirement date of the Participant, or

(ii) The date on which he shall have filed an application for a retirement income with his Employing Company, or

(iii) The date specified in such application as the date upon which such income shall commence,

and shall be payable to the retired Participant on the first day of each month thereafter during his lifetime provided that any payments under this Section will commence no later than sixty (60) days after the close of the Plan Year in which the following occur, whichever is later:

(i) Participant attains Age 65 or Normal Retirement Age;

(ii) Tenth Anniversary of year in which Participant commenced participation;

(iii) Participant terminates service.

Section 3. Reemployment of a Retired Participant.

(a) Any retirement income payable under this Plan to any retired Participant shall cease no later than the first date of his reemployment by an Employing Company or a Related Employer and shall resume as of the first day of the month coincident with or next following his subsequent retirement, in the amount provided for below.

(b) Upon the reemployment of a retired Participant prior to his attainment of Normal Retirement Date, he shall be eligible to re-enter this Plan.

(c) In any case where the payment of an early retirement income ceases due to reemployment, the amount of the retirement income to be paid on subsequent retirement

shall be actuarially determined, as applicable, on the basis of the increased service, age, contributions (if any), amount of retirement income paid, and any other factors which are relevant to such a determination.

Section 4. Limitation Regarding Small Payments. In the event that the present value of any retirement income or other benefit provided under this Plan is an amount less than one thousand seven hundred and fifty dollars ($1,750.00), present value may be paid in a lump sum in full discharge of all liability in respect of such retirement income or other benefit under the Plan.

Section 5. Payment to Incompetents. Until the Administrative Committee shall have received written notice that any person entitled to receive any benefit under this Plan is a minor, or is otherwise incompetent, it may authorize payment of such benefit directly to such person, and all liability for the payment thereof shall be discharged upon such payment. If, after receipt of such written notice as to any such person, the Administrative Committee shall receive evidence satisfactory to it that another person or an institution is then maintaining or has custody of such person, and that no guardian, committee or other legal representative of the estate of such person shall have been duly appointed, the Administrative Committee may authorize payment of such benefit to such other person or institution, and the release of such other person or institution shall be a valid and complete discharge for the payment so made.

Section 6. Misstatement in Application for Retirement Income. If any Employee in his application to participate in the Plan or for a retirement income, or in response to any request of his Employing Company or Related Employer for information, makes any statement which is erroneous or omits any material fact or fails before receiving his first payment to correct any information that he previously incorrectly furnished to the Employing Company for its records, his contributions (if any) and the amount of his retirement income shall be adjusted on the basis of the facts, and the amount of

any over-payment theretofore made to such Participant shall be deducted from his next succeeding payments as the Administrative Committee shall direct.

Section 7. Missing Persons. If the Administrative Committee is unable, within five years after any benefit becomes due from the Retirement Fund to a participant or beneficiary, to authorize payment because the identity or whereabouts of such persons cannot be ascertained, the Administrative Committee may direct that such benefit (which benefit shall in no event be less than the accrued retirement income, if any, earned by the Participant) and all further benefits with respect to such person shall be forfeited, and all liability for the payment thereof shall terminate, provided however, that, in such event, a death benefit shall be paid to the beneficiary or estate of the Participant, as provided for in Article VII, in all respects as though the death of the Participant had occurred on the date when the benefit referred to above would otherwise have been payable.

ARTICLE XI

FIDUCIARY RESPONSIBILITY

The following persons are hereby designated as fiduciaries under the Plan with the respective powers and duties allocated to them:

Section 1. Plan Administrator.

(a) **Designation.** This Plan shall be administered by an Administrative Committee, which shall be the Plan Administrator, and which shall consist of not less than three persons who shall be appointed from time to time by The Corporate Benefits Committee. Members of the Administrative Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by The Corporate Benefits Committee, no member of the Administrative Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) **Powers and Duties of the Administrative Committee.** The Administrative Committee shall have the following powers and duties:

(i) To establish and enforce such rules, regulations and procedures as it shall deem necessary or proper for the efficient administration of the Plan;

(ii) To interpret the Plan, including the supplying of any omissions in accordance with the intent of the Plan, its interpretation thereof in good faith to be final and conclusive upon all persons;

(iii) To decide all questions concerning the Plan and the eligibility of any Employee to become a Participant;

(iv) To compute the amount of benefits which shall be payable to any Participant, retired Participant, or beneficiary in accordance with the provisions of the Plan, and to determine the person or persons to whom such benefits shall be paid;

(v) To authorize or deny the payment of benefits;

(vi) To supervise and direct work of Corporation Personnel and Plan Representatives, in the administration of the Plan including without limitation the following duties:

(A) To prepare and file all reports with Government agencies;

(B) To prepare and distribute booklets, announcements, reports and descriptions of the Plan to employees, as shall be required by law;

(C) To maintain all records relating to the Plan and Trust Fund;

(D) To establish and administer at a local level a uniform claims procedure;

(E) To perform such other duties as shall be necessary to administer the Plan.

(vii) To review and approve the employment of all accountants, actuaries, consultants and attorneys as shall be deemed necessary from time to time, and to receive and evaluate their reports;

(viii) To review bonding and insurance requirements; and

(ix) To delegate in its discretion its powers and duties to administer the Plan to personnel of the Corporation.

provided, however, that the discretion vested in the Administrative Committee shall in all cases be exercised in a manner which is, so far as may be practicable, consistent and uniform as to all Employees similarly situated.

Section 2. Corporate Benefits Committee.

(a) **Designation.** The Corporate Benefits Committee shall be designated from time to time by the Directors and shall consist of not less than five (5) members. Members of the Corporate Benefits Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by the Directors, no member of the Corporate Benefits Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) **Powers and Duties.** The Corporate Benefits Committee shall have the following powers and duties:

(i) To terminate the Plan and/or Trust or discontinue contributions;

(ii) To amend or modify the Plan or Trust in whole or in part;

(iii) To appoint Trustees and other Fiduciaries and designate members of the Administrative Committee;

(iv) To determine the amount of contributions necessary to fund the Plan on an actuarially sound basis and to collect and pay all contributions to the Retirement Fund in a timely manner;

(v) To delegate to employees of the Corporation or to the Plan Administrator such additional powers and duties as it shall consider necessary or desirable in the operation of the Plan and Retirement Fund;

(vi) To review periodically all aspects of the Administration of the Plan.

Section 3. Investment Policy Committee.

(a) **Designation.** A Retirement Plan Investment Policy Committee of not less than five (5) persons shall be designated annually by the Corporate Benefits Committee to review the investment of assets in the Trust(s). Members of the Investment Policy Committee may participate in the benefits under the Plan provided they are otherwise eligible to do so. Except as otherwise provided by the Corporate Benefits Committee, no member of the Investment Policy Committee shall receive any compensation from the Retirement Fund for his services as such.

(b) **Powers and Duties.** The Investment Policy Committee shall have the following duties and powers:

(i) To develop investment policies and procedures, implement investment programs and monitor designated Trustee and Investment Advisor activities;

(ii) To employ and discharge Investment Advisors and to recommend the selection and/or termination of Trustees or Insurance Companies;

(iii) To receive and evaluate monthly, quarterly and annual reports of the Trustees and Investment Advisors;

(iv) To review investments made by the Trustees and Investment Advisors and other investments held by the Plan(s);

(v) To direct the flow of funds between trusts and allocate the amount of assets to be managed by each Trustee and Investment Advisor;

(vi) To report investment performance to the Corporate Benefits Committee at least once each quarter;

(vii) To supervise and coordinate when so directed by The Corporate Benefits Committee the investment policy for the funds of Pension Plans other than The Mead Industrial Products Salaried Retirement Plan.

Section 4. Trustees.

(a) **Designation.** The Trustees of any Trust Funds under the Plan shall be designated by the Corporate Benefits Committee.

(b) **Duties and Powers.** The Trustees shall have such duties and powers as are set forth in the Trust Agreement executed by the Company and the Trustee to fund benefits under this Plan.

ARTICLE XII

RETIREMENT FUND

Section 1. Retirement Fund.

(a) The Corporation shall maintain a Retirement Fund into which shall be paid the contributions of each Employing Company participating in the Plan and, to the extent there are any, the contributions of each Participant. The Retirement Fund may comprise either a trust fund or trust funds held by a trustee or trustees, a group annuity contract or contracts, or other forms of insurance or annuity contracts, including a deposit administration contract or contracts, or any combination thereof.

The contributions of each Employing Company shall be paid at such times, in such amounts, and in such manner as the Corporate Benefits Committee shall determine and as may be necessary to keep the Retirement Fund actuarially sound.

At no time prior to the satisfaction of all liabilities under the Plan with respect to Participants, retired Participants, and beneficiaries, shall any part of the corpus or income of the Retirement Fund be used for, or diverted to, any purpose other than for their exclusive benefit. No person shall have any financial interest in or right to the Retirement Fund or any part thereof, except as expressly provided for in this Plan.

(b) Each Participant or retired Participant or other person who shall claim the right to any payment under the Plan shall be entitled to look only to the Retirement Fund for such payment. No liability for the payment of benefits under the Plan shall be imposed upon the Board of Directors, the Administrative Committee, the Corporate

Benefits Committee, the Investment Policy Committee, the Trustees, the Corporation, an Employing Company or the officers, directors or stockholders of the Corporation.

(c) Forfeitures shall be applied to reduce future contributions to the Retirement Fund and shall not be allocated to increase any benefits of employees.

Section 2. Annual Actuarial Examination. At least once each year, the Corporation shall cause the liabilities of the Plan in respect of retirement incomes and other benefits to be evaluated by an Actuary who shall report to the Corporation as to:

(a) The soundness and solvency of the Retirement Fund in relation to such liabilities;

(b) The amount of the annual contribution by an Employing Company which would be sufficient to provide for currently accruing retirement income and other benefit liabilities; and

(c) The applicable limitations established by law as to the maximum and minimum amount of the contributions (with respect to both past and currently accruing benefits) which may be deducted for federal income tax purposes. An Actuary shall determine, and certify to the Administrative Committee, all actuarial computations necessary to the proper administration of this Plan.

Section 3. Separate Accounts. The Administrative Committee shall maintain, or cause to be maintained, a separate account for each Employing Company participating in the plan showing the value of its contributions to, the value of any funds of a Pre-existing Plan covering its employees included in, its share of earnings or losses in, and payments allocable to its employees from, the Retirement Fund and each separate part of the Retirement Fund.

ARTICLE XIII

MISCELLANEOUS PROVISIONS

Section 1. Non-Alienation of Benefits. No benefit which

shall be payable under this Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, garnishment, encumbrance, or charge by a Participant or a beneficiary or anyone claiming under either of them. If a Participant or a beneficiary or anyone claiming under either of them shall attempt to or shall subject in any manner any benefit which shall be payable under this Plan to anticipation, alienation, sale, transfer, assignment, pledge, garnishment, encumbrance, or charge, his interest in any such benefit shall terminate and the Administrative Committee shall instruct the trustee to hold or apply it to or for the benefit of such person, his spouse, children "or other dependents", or any of them as the Administrative Committee may instruct.

Section 2. Plan Not a Contract of Employment. This Plan shall not be deemed to constitute a contract between any Employee and an Employing Company, or to be a consideraion for the employment of any Employee. Nothing in this Plan shall give any Employee the right to be retained in the employ of an Employing Company; all Employees shall remain subject to discharge, discipline or layoff to the same extent as if the Plan had not been put into effect.

Section 3. Limitation Concerning Twenty-five Highest Paid Employees as Required by U.S. Treasury Regulations.

(a) In the event that either this Plan shall be terminated or the full current cost of this Plan shall have not been met during the 10-year period following its Effective Date, then, anything contained in this Plan to the contrary notwithstanding, except as provided by this Section, the following limitations shall apply to the part of the Retirement Fund contributed by the Employing Companies which may be used for the benefit of any person who on the Effective Date of this Plan shall have been among the twenty-five highest paid Employees, and whose anticipated annual retirement income payable under the Plan on normal retirement exceeds $1,500. Such part shall not exceed the greatest of: (i) $20,000; or (ii) an amount equal

to the contributions by the Employing Companies (or the part of the Retirement Fund attributable thereto) which would have been applied to provide benefits for such person if the Pre-existing Plans had been continued without change; or (iii) the sum of (A) an amount equal to the contributions by the Employing Companies (or the part of the Retirement Fund attributable thereto) which would have been applied to provide benefits for such person under the Pre-existing Plans if they had been terminated on the day before the effective date of this revised plan, and (B) an amount equal to 20% of the employee's average regular annual compensation, but not in excess of $10,000, multiplied by the number of years since the Effective Date.

(b) If the full current cost of this Plan shall at any time during the 10-year period following its Effective Date not have been met, but the Plan shall not have been terminated, the limited amount of current monthly retirement income allowable to any person under Subsection (a) of this Section 3 shall be increased to the extent necessary to provide the full monthly retirement income otherwise allowable under the Plan, provided, however, that the aggregate of such additional monthly payments in the year then current to all such persons does not exceed the aggregate contributions of the Employing Companies already made under the Plan in the year then current. If the aggregate of such contributions would be so exceeded, the additional payments to which any person would otherwise be entitled shall be reduced in the proportion that the aggregate of such contributions bears to the aggregate of such additional payments.

(c) If the retirement income of any person shall have been suspended in part in accordance with Subsection (a) of this Section 3 because the full current costs of the Plan shall not then have been met, and if the full current costs thereafter shall have been met, the full amount of the retirement income payable to him shall be resumed and the part of any income which shall have been suspended shall then be paid in full.

(d) In the event that it shall be determined by statute, court decision, ruling by the Internal Revenue Service, or otherwise, that the provisions of this Section 3 are no longer necessary to qualify the Plan under the Internal Revenue Code, this Section 3 shall be ineffective without amendment to the Plan.

Section 4. Modification or Discontinuance of the Plan.

(a) The Corporation expects and intends to maintain this plan in force indefinitely, but necessarily reserves the right to amend or discontinue the Plan in whole or in part at any time.

(b) At any time and from time to time, the Plan may be amended in whole or in part, or the contributions of an Employing Company may be suspended; provided, however, that no amendment shall be effective unless the Plan as so amended shall, prior to the satisfaction of all liabilities with respect to Participants, retired Participants, and beneficiaries under this Plan, be for the exclusive benefit of such persons.

(c) In case of the complete termination of the Plan (or partial termination as determined by the United States Department of the Treasury) the assets of the Plan available to provide benefits shall be allocated among Participants and Beneficiaries in the following order:

(i) First, to that portion of each individual's accrued benefit which is derived from the Participant's contributions to the Plan or any vested interests from prior plans.

(ii) Second, in the case of benefits payable as an annuity —

(A) In the case of the benefit of a Participant or Beneficiary which was in pay status as of the beginning of the three-year period ending on the termination date of the Plan, to each such benefit, based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least, the lowest benefit in pay

status during such three-year period being considered the benefit in pay status for such period, and

(B) In the case of a Participant's or Beneficiary's benefit (other than a benefit described in Subparagraph (A)) which would have been in pay status as of the beginning of the three-year period; and if his benefits had commenced (in the normal form of annuity under the Plan) as of the beginning of such period, to each such benefit based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such benefit would be the least.

(iii) Third —

(A) To all other benefits (if any) of individuals under the Plan, guaranteed under Title IV of the Employee Retirement Income Security Act of 1974 determined without regard to Section 4022(b)(5), and

(B) To the additional benefits (if any) which would be determined under Subparagraph (A) next preceding if Section 4022(b)(6) of the Act did not apply; and

applying Section 4021 of the Act for the purposes of this paragraph without regard to Subsection C thereof.

(iv) Fourth — To all other nonforfeitable benefits under the Plan.

(v) Fifth — To all other benefits under the Plan.

(d) For the purpose of Article XIII, Section 4(c):

(i) The amount allocated under any paragraph with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph.

(ii) If the assets available for allocation under any paragraph of Article XIII, Section 4(c) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated prorata among such individuals on the basis

of the present value (as of the termination date) of their respective benefits described in that paragraph.

(e) If the Plan is discontinued but the Corporate Benefits Committee further determines that the trust agreement shall be continued pursuant to its terms and the provisions of this Section, no further contributions will thereafter be made by either the Participants or the Employing Companies, but the trust agreement shall be administered otherwise as though the Plan were in full force and effect, except that no further benefits will accrue after the date of discontinuance. If the trust agreement is subsequently terminated, the trust assets shall then be allocated and distributed in accordance with the procedure set forth in Subsection (c) above.

(f) Any surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan (including any benefits accrued under any Pre-existing Plan), and after distribution of any released reserves as above provided, shall, subject to the pertinent provisions of federal or state law, be returnable to the respective Employing Company as determined by the Administrative Committee.

(g) If this Plan is terminated as to some (but not all) Participants, then the Corporation shall cause the part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the Actuary) to such Participants and their beneficiaries to be segregated, and the assets so segregated shall be applied for such Participants and beneficiaries as provided in paragraphs (c), (d) and (e) of this Section.

(h) Upon the complete discontinuance of contributions hereunder or upon complete termination of the Plan (or partial termination of the Plan as determined by the United States Department of the Treasury) the rights of each Participant (involved in the termination) to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the

amounts credited to this account at such time, are nonforfeitable.

Section 5. Effect of Corporate Reorganization, etc.

(a) In the event that the Employing Company shall become a party to any reorganization, merger, consolidation or other corporate readjustment, or shall be dissolved or liquidated, and, as a result thereof, a substantial part of the Employees of the Employing Company shall become the Employees of another corporation, then this Plan shall not be terminated or discontinued in whole or in part as to such Employing Company, and such other corporation or corporations shall, in all respects, be substituted for such Employing Company under this Plan.

(b) In the event that any entity other than the Corporation shall acquire a majority of the outstanding voting stock of the Corporation, or all or substantially all of the assets of the Corporation, or any plant, division or department thereof as a going concern, then, the Corporation, as determined by the Corporate Benefits Committee, may, in lieu of the normal operation of Article VIII or Section 4 of this Article, cause any part of the Retirement Fund which is allocable (as determined by the Administrative Committee upon the advice of the actuary) to Participants who thereupon become employed (directly or indirectly) by the acquirer and the beneficiaries of such Participants, to be segregated and deposited in a separate fund, which shall thereafter be held subject to this Plan and in such event the acquirer shall be vested with all of the powers vested in the Board of Directors with respect to this Plan as it relates to the acquirer's employees. In such case, this Plan shall not be terminated or discontinued in whole or in part. Alternatively, the Corporate Benefits Committee may terminate this Plan as to such acquired corporation, plant, division or department, in which case the allocable part of the Retirement Fund shall be segregated as provided above and applied as provided in Section 4 of this Article.

(c) In the event that any Employing Company shall be involved in a merger, consolidation, acquisition,

reorganization, liquidation, transfer of assets to another Plan or similar transaction, the accrued benefits earned by a Participant prior to the transaction shall not be reduced and shall be equal to or greater than the benefit to which he would have been entitled to receive before the transaction.

Section 6. Effect of Bargaining Agreements. In the event that a bargaining representative of any Participant negotiates an agreement for another retirement plan as to such Participant, such Participant shall, upon his inclusion in such Plan, be deemed to have terminated his service under this Plan.

ARTICLE XIV

PRE-EXISTING PLANS

RESERVED.

ARTICLE XV

GENERAL PROVISIONS

Section 1. Word Headings. The word headings of the sections and paragraphs of this Plan are supplied solely for the purpose of facilitating reference to such sections and paragraphs and shall not, in any way, alter, amend, supplement, substract from or otherwise change this Plan or any part thereof.

Section 2. Gender and Number. Where applicable, "he", "his", and "him" shall include "she", "hers" and "her", and references in the singular shall include the plural references.

Section 3. Ohio Plan. This Plan shall be construed and enforced according to the laws of the State of Ohio and all provisions shall be administered according to the laws of that State.

Section 4. Separability. Each provision hereof shall be independent of each other provision, and if any provision of this Plan proves to be, or is held by any Court or tribunal, board or authority of competent jurisdiction to be illegal, unenforceable or in conflict with any of the provisions of Section 401 of the Internal Revenue Code, as amended, any other

provision of law or the rules and regulations of the Commissioner of Internal Revenue or of the Secretary of the Treasury with respect to qualification of the Plan created herein as a tax-free retirement plan or with respect to deduction of the Corporation's contribution to the Plan in computing its net income for federal tax purposes, such provision shall be disregarded and shall be deemed to be null and void and no part of this Plan, but such invalidation of any such violative provisions shall not otherwise impair or affect this Plan or any of its other provisions provided however, that nothing in this paragraph shall be treated or interpreted so as to work a reversion or diversion of any funds to the Corporation.

IN WITNESS WHEREOF, the undersigned have executed this Plan on this 28th day of December, 1977.

THE MEAD CORPORATION
/s/ GORDON H. KETTERING
Vice President

ATTEST:
/s/ G. J. MALY, JR.
Asst. Secretary

FIRST AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended on prior occasions, including a complete restatement effective as of January 1, 1976 (the "Plan"), which separately sets forth the provisions of such Plan; and

WHEREAS, it is desirable to amend the Plan;

NOW, THEREFORE, effective as of January 1, 1976, but with respect only to those employees who retire, die or otherwise terminate their employment on or after January 1, 1976, the Plan hereby is amended in the respects herein provided.

1. Section 23 of Article I of the Plan hereby is amended to provide as follows:

Section 23. Hour of Service. An "hour of service" with respect to any Employee means an hour of service which shall be credited to him for purposes of the Plan for:

(a) each hour for which he is directly or indirectly paid, or entitled to payment, by his Employing Company for the performance of duties as an Employee; provided, however, that hours paid at a premium rate shall be treated as straight-time hours. These hours shall be credited to the Employee for the computation period or periods in which the duties are performed; and

(b) each hour for which he is directly or indirectly paid, or entitled to payment, by his Employing Company on account of a period of time during which no duties as an Employee are performed (irrespective of whether he remains an Employee) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence, up to a maximum of eight hours

per day and 40 hours per week; provided, however, that no more than 501 hours of service shall be credited to an Employee on account of any single continuous period during which he performs no duties (whether or not such period occurs in a single Plan Year); provided, further, that no hours of service shall be credited for payment which is made or due under a program maintained solely for the purpose of complying with applicable Workmen's Compensation, unemployment compensation, or disability insurance laws; and provided, further, that no hours of service shall be credited to an Employee for payment which is made or due solely as reimbursement for medical or medically related expenses incurred by him. These hours shall be credited to the Employee for the computation period or periods in which the period during which no duties are performed occurs, or if the period during which no duties are performed extends beyond one computation period, such hours shall be allocated between not more than the first two computation periods on any reasonable basis which is consistently applied with respect to all employees within the same reasonably defined job classification.

(c) each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by his Employing Company; provided, however, that the crediting of hours of service for back pay awarded or agreed to with respect to periods of employment or absence from employment described in any other subparagraph of this Section 23 shall be subject to the limitations set forth therein. These hours shall be credited to the Employee for the computation period or periods to which the award or agreement pertains rather than to the computation period in which the award, agreement, or payment was made; and

(d) each hour for which he would have been scheduled to work for his Employing Company during the period of time that he is on Approved Absence, up to a maximum of

eight hours per day and 40 hours per week; provided, however, that hours of service credited under this paragraph (d) when added to hours of service credited under paragraph (b) or (c), if any, by reason of such absence, shall not exceed a total of 1,000 hours of service for any one computation period.

Notwithstanding anything to the contrary contained in this Section 23, no more than one hour of service shall be credited to an Employee for any one hour of his employment or absence from employment. The rules set forth in paragraphs (b) and (c) of Department of Labor Regulation § 2530.200b-2, related to special rules for determining hours of service for reasons other than the performance of duties and the crediting of hours of service to computation periods, to the extent not provided hereunder, hereby are incorporated by reference, pursuant to Department of Labor Regulation § 2530.200b-2(f).

2. Section 1 of Article IV of the Plan hereby is amended to provide as follows:

Section 1. Normal Retirement. Each Participant who retires hereunder on or after his Normal Retirement Date shall be eligible for a normal retirement benefit in an amount computed in accordance with the provisions of Article V; provided, however, that the interest of each such Participant shall become fully vested and nonforfeitable upon attainment of age 65. Prior to January 1, 1979, no Participant may continue in employment with an Employing Company after his Normal Retirement Date, except with the express consent of such Participant and the Administrative Committee and then not beyond age 68; provided, however, that prior to the earlier of (i) the expiration date of any applicable collective bargaining agreement in effect for a Participant on September 1, 1977, or (ii) January 1, 1980, no Participant who is covered by such a bargaining agreement may continue in employment with an Employing Company after his Normal Retirement

Date, except with the express consent of such Participant and the Administrative Committee and then not beyond age 68. Except as otherwise provided by applicable State law, in no event may an Employee continue in employment with the Corporation, an Employing Company or any Related Employer beyond age 70.

3. Section 1(d) of Article V of the Plan hereby is amended to provide as follows:

(d) The Primary Social Security Benefit applicable to a Participant under (a) shall be determined by multiplying (i) a factor equal to 1.43% times his years of Credited Past Service with proportionate allowance for completed months, up to a maximum of 35 years, by (ii) the annual Primary Social Security Benefit to which the employee would be entitled at his Normal Retirement Date or earlier date of termination of employment.

4. Section 4 of Article V of the Plan hereby is amended to provide as follows:

Section 4. Maximum Retirement Benefit. The maximum aggregate projected annual retirement benefit which may be paid to a Participant under the Plan and any other qualified employee pension benefit plan maintained by an employer (as defined in Article XVI) at any time within a limitation year may not exceed the lesser of (i) 60% of his Final Average Earnings, as defined in Section 12(b) of Article I, including one-half of his Primary Social Security Benefit, as determined under Section 3(a) of this Article V, or (ii) the limitation provided in Article XVI.

5. Section 2 of Article IX of the Plan hereby is amended to provide as follows:

Section 2. Automatic Election For Married Participant. A Participant

(a) who is eligible to receive a normal, early,

disability, or vested deferred retirement benefit under Article IV, VI, or VIII; who has attained age 55; and who is married on the date payment of such benefit commences; or

(b) who dies (i) after retirement under conditions of eligibility for a normal or early retirement benefit under Article IV but prior to the commencement of benefit payments, or (ii) after his 65th birthday but before his retirement or other termination of employment; and who is married on the date of his death;

shall be deemed to have elected the qualified joint and survivor annuity, described as the option provided in Section 3(a) except that the effective rate shall be only a rate of one-half, and to have designated his spouse on such date as his beneficiary thereunder, unless prior to such date he either (i) has elected an optional method of payment under Section 3 of this Article IX which became or would have become effective upon commencement of benefit payments, or (ii) filed with the Administrative Committee a written rejection of this automatic election which has not been withdrawn; provided, however, that no monthly benefit shall become payable hereunder to a spouse as beneficiary if such spouse is not the same spouse to whom the former Participant was married on the date his benefit payment commenced, with respect to an automatic election under paragraph (a) of this Section 2.

6. The Plan hereby is amended by adding Section 3(h) to Article IX to provide as follows:

(h) Notwithstanding the foregoing provisions of this Section 3, if a Participant designates a person other than his spouse as his beneficiary, the present value of the total payments to be made to the beneficiary at the time the option becomes effective shall be less than 50% of the present value of the total payments to be made to the former Participant and his beneficiary combined, and if such is not the case, the monthly amount payable to his beneficiary

shall be reduced to the extent necessary to satisfy such requirement. A reduction made pursuant to this paragraph (h) shall be that which is necessary to determine the Actuarial Equivalent.

7. Section 4(e) of Article IX of the Plan hereby is amended to provide as follows:

(e)(i) Subject to the approval of the Administrative Committee and except as provided in (ii), a Participant in hardship cases may revoke his election of an option under Section 3 of this Article IX at any time before it becomes effective under the provisions of (d).

(ii) A Participant or former Participant who is eligible for the automatic election provided in Section 2 of this Article IX, may file a written rejection of the automatic election or a written withdrawal of such rejection, in the form prescribed by the Administrative Committee, if such election or withdrawal is received by the Employing Company or the Administrative Committee at least 80 days prior to commencement of his benefit payments. At least 18 months before the date a Participant or former Participant attains age 55, or, if later, the date his participation commenced, the Administrative Committee shall furnish such Participant with a written description of the automatic election described in Section 2 of this Article IX and the availability of a statement of the terms and conditions of the qualified joint and survivor annuity and its financial effect on his monthly retirement benefit. Notwithstanding any other provision of this Section 4(e)(ii), in no event shall the period during which a Participant may reject or withdraw a rejection of the automatic election end prior to 90 days after the date on which such statement is furnished to the Participant.

8. The Plan hereby is amended by amending Section 5 of Article IX and by adding to Article IX, Sections 6, 7, 8, 9 and 10, to provide as follows:

Section 5. Special Joint and Survivor Annuity. Each Participant who has attained age 54, but who has not attained age 65, and who has ten or more years of Qualifying Service may elect, after his Coverage Effective Date (defined in Section 9), to receive a reduced monthly retirement benefit and pre-retirement survivor benefit (special joint and survivor annuity) coverage for his spouse under Sections 5 through 10 of this Article IX, in lieu of any retirement benefit otherwise payable under the Plan.

Section 6. Election Period. A Participant's election under Section 5 shall be filed with the Administrative Committee, on such form as it shall require, not earlier than 90 days before such Participant becomes eligible to make an election as provided in Section 5 and not later than the earlier of (i) such Participant's retirement or other termination of employment with the Corporation, an Employing Company, or a Related Employer, or (ii) his 65th birthday. At least six months prior to the date on which a Participant becomes eligible to make an election as provided in Section 5, the Administrative Committee shall furnish such Participant with a written description of the pre-retirement survivor benefit and the availability of a statement of the terms and conditions of the pre-retirement survivor benefit and its financial effect on his monthly retirement benefit.

Section 7. Survivor Benefit. If a Participant who has made an election under Section 5 of this Article IX shall die after his Coverage Effective Date and before his election terminates under Section 10, a monthly payment will be made to the surviving spouse of the Participant, provided that the Participant had not retired or otherwise terminated employment with the Corporation, an Employing Company, or a Related Employer prior to his death. The amount and duration of such monthly payment to the Participant's surviving spouse shall be determined and paid as if the Participant had retired on the date immediately preceding the date of his death and had elected to receive a

monthly retirement benefit under the automatic election of Section 2, based upon his Credited Service and the benefit rate in effect on the date of his death; provided, however, that the amount of the benefit so determined shall be reduced, as well, by the appropriate factor provided in Section 8 to reflect the cost of pre-retirement survivor benefit coverage under Section 5.

Section 8. Reduction of Other Benefits. The amount of any monthly retirement benefit otherwise payable under the Plan after a Participant's election terminates under Section 10 shall be reduced, in accordance with the following table, for each full year (with pro rata reduction for completed months) between the Coverage Effective Date and the date his pre-retirement survivor benefit coverage terminates. If a Participant files more than one election under Section 5, such reduction shall be applied for the entire period during which any pre-retirement survivor benefit coverage was in effect.

Proportion of Reduced Retirement Benefit to Be Paid To Beneficiary Under Option Elected	Percentage Reduction of Retirement Benefit of Participant for Each Full Year of Coverage (With Pro Rata Reduction For Completed Months)
1/2	1/2 of 1%
2/3	2/3 of 1%
3/4	3/4 of 1%

Section 9. Coverage Effective Date. A Participant's "Coverage Effective Date" shall be the first date, after his election under Section 5 has been filed with the Administrative Committee, as provided in Section 6, on which the Participant has attained age 55 and has completed ten years of Qualifying Service, or, if later, the date specified in such election as the Coverage Effective Date; provided, however, that a Participant's Coverage Effective Date shall not occur before the end of the 12-month period

beginning on the date his election is filed with the Administrative Committee, unless the death of the Participant is a result of accidental causes and failure to give effect to the election would deprive the survivor of the Participant of a survivor annuity.

Section 10. Termination and Revocation of Election. A Participant's election under Section 5 shall terminate automatically on the date his spouse dies, he is divorced, he retires or otherwise terminates employment, or he attains age 65, whichever is earliest. Moreover, a Participant, at any time before such date, may file with the Administrative Committee a written revocation of a previous election under Section 5, and such election shall terminate on the date the revocation is filed. A Participant subsequently may file an election under Section 5 and such election shall be treated as a new election for all purposes of Sections 5 through 10.

9. Section 7 of Article X of the Plan hereby is amended to provide as follows:

Section 7. Missing Persons. If the Administrative Committee is unable to ascertain the identity or location of a former Participant or beneficiary to whom a benefit is due and payable hereunder, the Administrative Committee may direct that such benefit shall be forfeited. Such benefit shall in no event be less than that which is fully vested hereunder, if any. However, if a claim is made for such forfeited benefit by such Participant or beneficiary, the Administrative Committee shall reinstate such forfeited benefit and shall make payment as otherwise provided under the Plan.

10. The Plan hereby is amended by adding thereto Article XVI to provide as follows:

ARTICLE XVI

MAXIMUM RETIREMENT BENEFITS

Section 1. Definitions. For purposes of this Article XVI, the following definitions shall apply in addition to those set forth in Article I:

(a) The term "employer" shall mean the Corporation and any other corporation which is a member of a controlled group of corporations (within the meaning of Section 1563(a) of the Internal Revenue Code of 1954, as amended (the "Code"), determined without regard to Section 1563(a)(4) and Section 1563(e)(3)(C) of the Code, as modified by Section 415(h) of the Code) of which the Corporation also is a member.

(b) A "limitation year" shall mean a calendar year or such other 12-month period elected by the employer pursuant to Internal Revenue Service Regulations and rulings under Section 415 of the Code, or applicable portion thereof, commencing on or after January 1, 1976, and each such calendar year or other such 12-month period thereafter.

(c) A Participant's "projected annual retirement benefit" shall mean the annual retirement benefit which would be payable to the Participant under the Plan based on the assumpiton that he continues his employment as an Employee until his Normal Retirement Date and that his compensation for the limitation year continues at the same rate until his Normal Retirement Date, and on the basis of the federal Social Security Act as in effect on the last day of the limitation year. A Participant's "aggregate projected annual retirement benefit" shall include his projected annual retirement benefit under the Plan and his projected retirement benefit, if any, under any other defined benefit plan maintained by the employer.

(d) The limitations contained in this Article XVI shall be applicable only with respect to benefits provided

pursuant to defined contribution plans and defined benefit plans specified in Section 415(k) of the Code.

Section 2. Maximum Defined Benefit Limitation. Subject to the provisions of Section 3, the maximum aggregate projected annual retirement benefit which may be paid to a Participant under the Plan and any other defined benefit plan maintained by an employer at any time within a limitation year may not exceed the lesser of:

(a) $80,475 (subject to adjustment annually pursuant to Internal Revenue Service Regulations under Section 415 of the Code), or

(b) 100% of the Participant's average annual compensation for his highest three consecutive years of service,

multiplied by the following:

(c) the appropriate factor prescribed by the Internal Revenue Service, if the Participant's retirement benefit is to be paid in a manner other than to the Participant for life only or under Section 2 of Article IX, with the Participant's spouse as beneficiary thereunder; and

(d) the percentage determined by dividing the number of his years of Qualifying Service by 10, if the Participant has less than ten years of Qualifying Service; and

(e) a factor which converts such benefit to its actuarial equivalent commencing at age 55, if payment of the Participant's retirement benefit is to commence prior to age 55 and the maximum described in subparagraph (a) of this Section 2 is applicable.

Section 3. Exception. If the Participant's projected annual retirement benefit does not exceed $10,000, as adjusted by the percentage shown in subparagraph (d) of Section 2 of Article XVI, if applicable, he may receive the full amount of such benefit without regard to the other limitations specified in Section 2, provided the Participant did not participate at any time in any defined contribution plan maintained by an employer.

Section 4. Manner of Reduction. If the Participant's aggregate projected annual retirement benefit exceeds limitations specified in Section 2, the reduction in the amount of his projected annual retirement benefit under the Plan shall be equal to the amount by which his aggregate projected annual retirement benefit exceeds the limitations of Section 2, multiplied by a fraction, the numerator of which is his projected annual retirement benefit under the Plan (determined without regard to Section 2), and the denominator of which is his aggregate projected annual retirement benefit under the Plan and any other defined benefit plan maintained by an employer (determined without regard to the limitations of Section 2, or any corresponding limitation in any other defined benefit plan maintained by an employer).

Section 5. Maximum Defined Benefit and Defined Contribution Limitation. If a Participant also is covered by one or more defined contribution plans maintained by an employer concurrently with the Plan, the sum of the defined benefit plan fraction described in subparagraph (a) and the defined contribution plan fraction described in subparagraph (b) of this Section 5 in no event shall exceed 1.4 in any limitation year.

(a) The defined benefit plan fraction (determined as of the close of such limitation year) shall be a fraction the numerator of which is the aggregate projected annual retirement benefit of such Participant and the denominator of which is the maximum retirement benefit allowable under Section 2; and

(b) The defined contribution plan fraction shall be a fraction the numerator of which is equal to the sum of:

(i) total employer contributions allocated to the Participant's account or accounts maintained under all such plans during each limitation year;

(ii) total forfeitures, if any, allocated to the Participant's account or accounts maintained under all such plans during each limitation year; and

(iii) the lesser of:

(1/) one-half of the Participant's own contributions to all such plans (plus his own voluntary contributions, if any, made under any other defined benefit plan maintained by an employer) during each limitation year; or

(2/) the Participant's own contributions to all such plans (plus his own voluntary contributions, if any, made under any other defined benefit plan maintained by an employer) during each limitation year, in excess of 6% of his compensation for the Plan Year;

and the denominator of which is the sum, for all limitation years, of the amounts determined for each such limitation year, as follows:

(iv) the lesser of:

(1/) $26,825 (subject to adjustment annually pursuant to Internal Revenue Service Regulations and rulings under Section 415 of the Code), or

(2/) 25 percent of the Participant's compensation paid by an employer for such limitation year.

In the event that the sum of the defined benefit plan fraction and the defined contribution plan fraction would exceed the limitation of 1.4, the benefits otherwise payable to a Participant under the Plan shall be reduced to the extent necessary to meet such limitation.

* * *

EXECUTED this 14th day of September, 1979.

THE MEAD CORPORATION
By /s/ G. H. SHEETS
Title: Executive Vice President

Attest:
/s/ G. J. MALY, JR.
Title: Secretary

AMENDMENT NO. 2
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

The Plan is hereby amended in the following respects, effective May 1, 1978.

1. The first sentence of Section 3 of Article IX is hereby amended to read as follows:

In lieu of the normal form of retirement income payable to a Participant under the terms of this Plan, such Participant may elect to receive a benefit which is the Actuarial Equivalent thereof, in any one of the following forms:

2. Subsection (e) of Section 3 of Article IX is hereby amended to read as follows:

(e) An annuity in some other form, provided that such annuity is judged by the Administrative Committee to be in the best interests of the retiring Participant, and provided further that the Participant is able to comply with such requirements as may be prescribed by the Administrative Committee for the purpose of determining its action on his election.

3. A new subsection (i) of Section 3 of Article IX is hereby added to read as follows:

(i) A lump sum distribution. In determining the value of such a distribution, the Administrative Committee shall employ the then current interest assumption used by the Actuary to perform its annual examination pursuant to Section 2 of Article XII.

4. Subsection (a) of Section 4 of Article IX is hereby amended to read as follows:

(a) (i) To become effective, an election of an optional form of retirement income (other than optional forms under Sections 3(e), 3(i) and 5 of this Article) must have been made either within thirty (30) days following the Effective Date of this Plan or at least thirty (30) days before the Normal Retirement Date or earlier actual retirement of the Participant.

(ii) To become effective, an election of an optional form of retirement income, as described in Sections 3(e), 3(i) and 5 of this Article must have been made either within one year following the Effective Date of this Plan or at least one year before the Normal Retirement Date or earlier actual retirement of the Participant.

(iii) Notwithstanding paragraphs (i) and (ii) above, a Participant may elect an optional form of retirement income or change his beneficiary at any time prior to his retirement if the Participant shall furnish evidence of good health satisfactory to the Administrative Committee, provided that a Participant who is retired involuntarily prior to his normal retirement date, may exercise his election of an optional form of retirement income at any time prior to his actual retirement.

5. Subsection (e) of Section 4 of Article IX of the Plan hereby is amended to provide as follows:

(e) (i) A Participant may revoke his election of an optional form of retirement income within the time limits and under the circumstances set forth in Subsection (a) above. Subject to the approval of the Administrative Committee and except as provided in (ii), a Participant in hardship cases may revoke his election of an option under Section 3 of this Article IX at any time before it becomes effective under the provisions of (d).

(ii) A Participant or former Participant who is eligible for the automatic election provided in Section 2 of this Article IX, may file a written rejection of the automatic election or a written withdrawal of such rejection, in the form prescribed by the Administrative Committee, if such election or withdrawal is received by the Employing Company or the Administrative Committee at least 80 days prior to commencement of his beneift payments. At least 18 months before the date a Participant or former Participant attains

age 55, or, if later, the date his participation commenced, the Administrative Committee shall furnish such Participant with a written description of the automatic election described in Section 2 of this Article IX and the availability of a statement of the terms and conditions of the qualified joint and survivor annuity and its financial effect on his monthly retirement benefit. Notwithstanding any other provision of this Section 4(e)(ii), in no event shall the period during which a Participant may reject or withdraw a rejection of the automatic election end prior to 90 days after the date on which such statement is furnished to the Participant.

6. New Subsection (h) of Section 4 of Article IX is hereby added to read as follows:

(h) Regardless of when the election of an optional form of retirement income is made or becomes effective, the actuarial assumptions, tables and factors used to determine the appropriate Actuarial Equivalent shall be those in effect without regard to retroactive changes on the later of (i) the last date specified in paragraphs (i) or (ii) of Subsection (a) above upon which the optional form could have been elected, or (ii) the date upon which the optional form is elected pursuant to paragraph (iii) of Subsection (a).

7. In all other respects, the Plan shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 2nd day of January, 1979.

THE MEAD CORPORATION
By /s/ LEE BAUMANN
Vice President

ATTEST:
By /s/ G. J. MALY, JR.
Assistant Secretary

THIRD AMENDMENT TO THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended on prior occasions, including a complete restatement effective as of January 1, 1976 (the "Plan"), which separately sets forth the provisions of such Plan, and the Plan has been amended on two subsequent occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1979, but with respect only to those employees who retire, die, or otherwise terminate their employment on or after January 1, 1979, the Plan hereby is amended in the respects herein provided.

1. Section 8 of Article I of the Plan hereby is amended to provide as follows:

Section 8. Employee. A regular, full-time person who is employed by an Employing Company, as determined by the Employing Company under its normal practices, and who is (i) a citizen of the United States, (ii) an alien permanently assigned to an Employing Company, as determined by the Administrative Committee, or (iii) an alien on permanent or temporary assignment who was covered by the Plan prior to January 1, 1979. The term "Employee" shall not include any person

(a) who is accruing benefits under any other employee penson benefit plan, other than the Mead Employee Stock Ownership Plan, which is qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended (the "Code"), and to which the Corporation or any other controlled corporation (as that term is defined in Section 1563(a) of the Code, deter-

mined without regard to Sections 1563(a)(4) and 1563(e)(3)(C) of the Code) makes contributions; or

(b) who is participating in any employee pension benefit plan maintained in a foreign country primarily for foreign nationals.

Further, a former Employee of an Employing Company who is transferred to work as an employee for a Related Employer which is not such a controlled corporation shall continue to be an Employee unless such transferred employee (i) waives his right to accrue benefits under the Plan, (ii) is accruing benefits under a plan described in (a), or (iii) is participating under a plan described in (b). The term "Employee" includes a person who is on Approved Absence, if immediately prior to such Approved Absence, such person was an Employee.

2. Section 12(b) of Article I of the Plan hereby is amended to provide as follows:

(b) **For Minimum Retirement Income.** For purposes of determining Minimum Retirement Income under Section 3 of Article V, the average annual Earnings of a Participant during the five (5) calendar years in which his Earnings have been highest, selected from the last eleven (11) years (including his year of retirement) of his continuous employment as a Participant with the Corporation, an Employing Company or a Related Employer before his Early Retirement Date, Normal Retirement Date, or the date on which he terminates his employment with a vested interest, whichever comes first.

3. Section 12(c) of Article I of the Plan hereby is amended to provide as follows:

(c) **Determination.** In the event that an Employee has less than five (5) years of such continuous employment, the Final Average Earnings shall be the average of all complete calendar years prior to his Normal Retirement Date.

For purposes of paragraph (a), in the event that a Participant has less than one full year of continuous employment, Final Average Earnings will be based on the January 1, 1976 Earnings on an annualized basis.

4. Section 6 of Article III of the Plan hereby is amended to provide as follows:

Section 6. Reemployment. Upon the reemployment by the Corporation, an Employing Company or a Related Employer of a Participant who was terminated without any vested benefit, the Participant shall receive Credited Service.

(a) for his continuous employment as a Participant earned prior to his attaining age 65 and prior to his termination of employment, if the period of his break in employment is less than his period of employment which occurred prior to the break, or

(b) for the period of the break in employment which occurred prior to his attaining age 65, if the Participant is reemployed within the 12-month period which follows his date of termination of employment.

Upon the reemployment by the Corporation, an Employing Company or a Related Employer of a Participant who had terminated with a vested benefit, he shall receive Credited Service for his service with the Corporation or an Employing Company as a Participant which occurs prior to his attaining age 65 and for which he had Earnings.

5. Section 1 of Article IV of the Plan hereby is amended to provide as follows:

Section 1. Eligibility For Normal Retirement. Each Participant who retires on or after the date he attains age 65 from employment with the Corporation, an Employing Company and a Related Employer (i) shall be eligible for a monthly normal retirement benefit in an amount computed in accordance with the provisions of Article V, and (ii), as of the date on which he attains age 65, shall have a fully vested and nonforfeitable interest in his monthly normal retirement benefit. A Participant's Normal Retirement

Date means the first day of the month coincident with, or next following the date on which he attains age 65. On or after January 1, 1979, no Employee may continue in the employ of the Corporation, an Employing Company or a Related Employer after he has attained age 70 unless otherwise provided by State law.

6. The first sentence of Section 1 of Article V of the Plan hereby is amended to provide as follows:

Section 1. Amount of Retirement Income.

A Participant who retires on or after his Normal Retirement Date shall be entitled to a monthly normal retirement benefit equal to the greater of the amounts specified in paragraph (a) or (b) for all years prior to January 1, 1976 and prior to age 65, plus the amount specified in paragraph (c) for all years after December 31, 1975 and prior to age 65, as follows:

7. Section 4(a) of Article IX of the Plan hereby is amended to provide as follows:

Section 4. Conditions Relative to Optional Forms of Retirement Income.

(a)(i) To become effective, a Participant's election of an optional form of payment of his retirement income (other than the optional forms of payment provided under the terms of Sections 3(e), 3(i) and 5 of this Article IX) must be made either within 30 days following the Effective Date of the Plan or at least 30 days before his Normal Retirement Date or earlier actual retirement.

(ii) To become effective, a Participant's election of an optional form of payment of his retirement income, as described in Sections 3(e), 3(i) and 5 of this Article IX, must be made either within one year following the Effective Date of the Plan or at least one year before his Normal Retirement Date or earlier actual retirement.

(iii) Notwithstanding the provisions of (i) and (ii), a Participant may elect an optional form of payment of his retirement income or change his beneficiary at any time prior to the earlier of his attaining age 65 or his retirement date, if he furnishes evidence of good health satisfactory to the Administrative Committee; and provided, further, that a Participant who is retired involuntarily prior to his Normal Retirement Date, may exercise his election of an optional form of payment of his retirement income at any time prior to his actual retirement.

8. Section 3(c) of Article X of the Plan hereby is amended to provide as follows:

(c) In any case where the payment of a retirement benefit provided by the terms of the Plan to a Participant ceases due to his reemployment by the Corporation, an Employing Company or a Related Employer, the amount of his retirement benefit which will be paid on his subsequent retirement shall be determined actuarially on the basis of, as applicable, his increased service (if any) prior to the date on which he attains age 65, age, contributions (if any), amount of retirement benefit which was paid to him prior to his reemployment, and any other factors which are relevant to such a determination.

* * *

EXECUTED at Dayton, Ohio, this 28th day of December, 1979.

THE MEAD CORPORATION
By /s/ C. H. GEBHARDT, V.P.
Title:

Attest:
/s/ CHARLES N. SHANE, JR.
Title:

FOURTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the plan has been amended on three prior occasions; and

WHEREAS, it is desirable to further amend the Plan in accordance with action taken by the Board of Directors in January 1981;

NOW, THEREFORE, effective as of January 1, 1981, but with respect only to Employees who retire, die or otherwise terminate their employment on or after January 1, 1981, the definition of Earnings contained in Article I, Section 11(a) of the Plan is amended to provide as follows:

Section 11. Earnings.

(a) **For Years After December 31, 1975:**
Amounts paid by an Employing Company to an Employee, amounts paid by a Related Employer to a former Employee of an Employing Company now employed by a Related Employer, and amounts paid by a Related Employer to a current Employee prior to his transfer to an Employing Company, for services, excluding:

(i) Amounts paid other than in cash;

(ii) Gifts;

(iii) Amounts paid pursuant to a long-term incentive plan;

(iv) Amounts deferred by an Employee pursuant to a plan or agreement of deferred compensation;

(v) Amounts paid pursuant to a special arrangement, agreement or contract between the Employing Company or Related Employer and an individual Employee, except as provided by the Corporate Benefits Committee;

(vi) Twenty percent of all commissions paid to an Employee whose compensation is wholly or partially determined on the basis of gross commissions; provided, however, that this exclusion shall not apply to an Employee whose sales-related expenses are reimbursed by the Employing Company or Related Employer; and

(vii) Amounts received by an Employee as reimbursement for relocation costs.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 30th day of January, 1981.

THE MEAD CORPORATION
By /s/ LEE BAUMANN
Vice President

Attest:
By /s/ G. J. MALEY, JR.

FIFTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS
SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the plan has been amended on four prior occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1981, but with respect only to Employees who retire, die or otherwise terminate their employment on or after January 1, 1981, Section 4 of Article III of the Plan is amended and a new Section 8 is added to Article V as follows:

> **Section 4. Approved Absence.** For the purpose of this Plan, Credited Service shall be preserved during Approved Absence, but any calendar year after the applicable Effective Date during the entirety of which an Employee is on such Approved Absence and as to which no Earnings are payable to the Employee shall not be credited for the purposes of this Plan.
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> * * *
>
> **Section 8. Offsets for Other Retirement Benefits.** A Participant's retirement income calculated under Sections 1 and 3 of this Article V shall be reduced by any retirement income, expressed as an annual income payable for life, which he is eligible to receive from a tax-qualified retirement plan of the Employing Company or a Related Company and which is attributable to Credited Service used in computing his retirement income under the Plan.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 23rd day of October, 1981.

THE MEAD CORPORATION
By /s/ LEE BAUMANN

Attest:
By /s/ M. D. VOLTZ

SIXTH AMENDMENT
TO
THE MEAD INDUSTRIAL PRODUCTS SALARIED RETIREMENT PLAN
(January 1, 1976 Restatement)

WHEREAS, The Mead Industrial Products Salaried Retirement Plan was established for the benefit of eligible employees; and

WHEREAS, such Plan has been amended and restated on prior occasions, including a complete restatement effective as of January 1, 1976, which was executed on December 28, 1977 (the "Plan"), which separately sets forth the provisions of such Plan, and the Plan has been amended on five prior occasions; and

WHEREAS, it is desirable to further amend the Plan;

NOW, THEREFORE, effective as of January 1, 1982, but with respect only to Employees who retire, die or otherwise terminate their employment on or after April 1, 1982, a new subsection (c) of Section 2 is added to Article V of the Plan, and a new subsection (i) of Section 4 is added to Article IX as follows:

(c) A Participant who elects an Early Retirement Date in accordance with the conditions of this Subsection shall be entitled to a retirement income supplement for life, payable monthly in conjunction with his retirement income, in an annual amount which is equal to (i) the retirement income he would receive if his Early Retirement Date were his Normal Retirement Date, minus (ii) the amount of retirement income to which he is entitled under Subsection (a) above. An electing Participant must have attained age fifty-five (55) and accrued at least ten (10) years of service as of January 1, 1982. At that date, he must be either (i) actively employed on a regular payroll or (ii) receiving short-term disability payments in the nature of salary continuation. He must elect the retirement supplement between January 1 and February 28, 1982, and retire on April 1, 1982; provided, however, that each Employing Company reserves the right to defer a Participant's retirement to a date not later than April 1, 1983. Participants otherwise eligible for the retirement supplement who do not make a timely election in accordance with the foregoing sentence shall not be entitled to the supplement at any time.

* * *

(i) Notwithstanding Subsections (d) and (e) above, a Participant who had attained his Normal Retirement Date prior to April 1, 1982, and who had not then retired, may revoke his election of an optional form of retirement income and substitute another option therefor; provided he actually retires on April 1, 1982, or such later date on or before April 1, 1983, to which his Employing Company defers his retirement.

IN WITNESS WHEREOF, the undersigned have executed this Amendment on this 28th day of June, 1982.

THE MEAD CORPORATION
By /s/ LEE BAUMANN
Vice President

Attest:
By /s/ MARY S. DeWALLS
Assistant Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

[TITLE OMITTED IN PRINTING]

ANSWER OF DEFENDANT THE MEAD CORPORATION TO AMENDED COMPLAINT

(Filed December 17, 1984)

1. Defendant denies the first (unnumbered) paragraph on page 1 of the Amended Complaint. The Defendant admits the allegation of paragraph No. 1 of the Amended Complaint.

2. Defendant admits that the Plaintiffs at one point were employees of Lynchburg Foundry Company, and that Lynchburg Foundry Company was a wholly owned subsidiary of the Defendant; Defendant denies the remaining allegations of paragraph No. 2 of the Amended Complaint.

3. Defendant admits that there was a retirement plan covering certain of its employees, and denies the remaining allegations of paragraph No. 3 of the Amended Complaint.

4. Defendant admits that a special voluntary retirement program was made available to certain employees for a limited period of time, and that none of the Plaintiffs elected to participate in that program. Defendant denies the remaining allegations of paragraph No. 4 of the Amended Complaint.

5.-8. Defendant denies the allegations of paragraphs No. 5-8 of the Amended Complaint.

9. Defendant admits that plans were announced to divest itself of the Lynchburg Foundry Company and Murray Rubber Company, and denies the remaining allegations of paragraph No. 9 of the Amended Complaint.

10. Defendant admits the sale of the Lynchburg Foundry Company, and denies the remaining allegations of paragraph No. 10.

11. Defendant admits the giving of notice to salaried employees of termination of the pension plan, and denies the remaining allegations of paragraph No. 11.

12.-13. Defendant denies the allegations of paragraphs No. 12-13 of the Amended Complaint.

14. Defendant admits that certain payments were made to Plaintiffs in full satisfaction of their retirement benefits, and that it has discontinued payments into any retirement fund on behalf of the Plaintiffs. Defendant denies the remaining allegations of paragraph No. 14.

15.-22. Defendant denies the allegations of paragraphs No. 15-22 of the Amended Complaint.

Count I

23.-24. Defendant denies the allegations of paragraphs No. 23-24 of the Amended Complaint.

Count II

25.-26. Defendant denies the allegations of paragraphs No. 25-26 of the Amended Complaint.

Count III

27.-28. Defendant denies the allegations of paragraphs No. 27-28 of the Amended Complaint.

Count IV

29. Defendant denies the allegations of paragraph No. 29 of the Amended Complaint.

Count V

30. Defendant denies the allegations of paragraph No. 30 of the Amended Complaint.

Count VI

31. Defendant denies the allegations of paragraph No. 31 of the Amended Complaint.

Count VII

32. Defendant denies the allegations of paragraph No. 32 of the Amended Complaint, and of the sentence beginning at the bottom of page 14 and continuing to page 15.

First Defense

1. The Amended Complaint fails to state a claim upon which relief can be granted.

Second Defense

2. This Court lacks jurisdiction over the subject matter of this action.

Third Defense

3. This action is barred in whole or in part by the applicable statutes of limitation.

Fourth Defense

4. This action is barred in whole or in part by the applicable statute of frauds.

Fifth Defense

5. This action is not ripe for adjudication. Plaintiffs have failed to exhaust their remedies under the retirement plan, prior to instituting this action.

Sixth Defense

6. Plaintiffs chose to reject an offer to participate in the special voluntary retirement program offered by Defendant. Plaintiffs' action is barred by the doctrines of waiver, estoppel, and election of remedies.

Seventh Defense

7. Plaintiffs accepted lump-sum payments from Defendant, upon termination of the retirement plan. Under the doctrines of payment and of accord and satisfaction, Plaintiffs may not recover further money from Defendant.

Eighth Defense

8. There is no right of action under the Employee Retirement Income Security Act, as amended, for recovery of the relief sought. In addition, the prerequisites under the Employee Retirement Income Security Act for the bringing of this action have not been met.

Ninth Defense

9. In the alternative, there was a want of consideration or a failure of consideration on the part of Plaintiffs, which bars recovery.

WHEREFORE, Defendant The Mead Corporation asks this Court to order:

1. That Plaintiffs' Amended Complaint be dismissed with prejudice, at the cost of the Plaintiffs; and

2. Such other and further relief as this Court deems just.

Respectfully submitted,

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PETITIONER'S

BRIEF

(6)

87-1868

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE MEAD CORPORATION,
Petitioner

v.

B.E. TILLEY, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, upon termination of a pension plan, ERISA requires subsidized early retirement benefits not earned under the terms of the plan to be paid to plan participants before surplus plan assets may revert to the employer.

2. Whether the court below abused its discretion in reaching and deciding the damages issue when that issue was not addressed by the district court, and was not raised, briefed, or argued on appeal.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, The Mead Corporation, and the respondents, B.E. Tilley, David H. Wall, William L. Crotts, Chrisley H. Reed, J.C. Weddle, and William D. Goode. The parties before this Court are identical, except for respondent David H. Wall who died while the action was pending in the district court.*

SUBSIDIARIES AND AFFILIATES OF PETITIONER, THE MEAD CORPORATION

The subsidiaries and affiliates of Petitioner, The Mead Corporation, are listed in Mead's Petition at p. II, and Mead's Reply Memorandum at p. I.

* On October 17, 1988, this Court denied Respondents' motion to substitute Richard H. Wall, Executor of the Estate of David H. Wall, in place of David H. Wall, deceased.

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IN THE

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OCTOBER TERM, 1988

NO. 87-1868

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1a-8a)[1] is reported at 815 F.2d 989. The memorandum opinion of the United States District Court for the Western District of Virginia (Turk, Chief Judge) (Pet. App. 10a-15a) is not reported.

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[1] References in this brief will be to the separately printed Appendix filed with Mead's Petition for Certiorari ("Pet. App."), the Joint Appendix ("J.A."), the Appendix to this brief ("A.") or to the Record ("R.").

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1987. Pet. App. 16a. A timely petition for rehearing with suggestion for rehearing en banc was denied by the Fourth Circuit on February 17, 1988. Pet. App. 17a. The petition for a writ of certiorari was filed on May 16, 1988, and was granted on October 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of Subpart D of the Internal Revenue Code ("Code"), 26 U.S.C. §§ 401(a)(2); 411(a)(7); 411(a)(8); 411(a)(9); 411(c)(3); 411(d)(3); 411(d)(6); and Section 4044 of The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1344 (1974), are set forth in the Appendix to this brief. A. 1-6.

STATEMENT OF THE CASE

I. BACKGROUND

This case involves an interpretation of ERISA, the landmark 1974 statute establishing a comprehensive federal legislative and regulatory program for private pension and other employee benefit plans. Nationwide, there are over 60 million participants covered by 870,000 private retirement plans with almost $1.5 trillion in plan assets. More than a quarter of those plans are defined benefit plans similar to the one at issue here. 6 Pension Plan Guide ¶ 25,918 (CCH) (1988). Under such plans " 'the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those

benefits.' " *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 363 n. 5 (1980) (quoting *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 593 n. 18 (1977)). In funding a defined benefit plan, the employer selects a funding method that typically contains actuarial assumptions about such things as salary increases, mortality and turnover of employees, and investment return on plan assets to determine the amount of its required annual contribution. Precisely because many actuarial assumptions must be made, it is extremely unlikely that at any given moment plan assets will be equal to the employees' benefits earned under the terms of the plan.

Under a defined benefit plan the employer assumes the entire risk if actual plan experience results in insufficient assets to pay benefits earned under the plan; the employees bear no risk of poor plan performance and their "defined benefit" is unaffected by whether plan investments are good or bad. In marked contrast, the " 'other basic type of pension is a 'defined *contribution*' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide.' " *Id.* (emphasis added). The risk of poor investment performance in such plans is on the employees.

When a defined benefit plan terminates, plan assets may either exceed or fall short of benefits earned under the express terms of the plan. If the plan has been generously funded, or has enjoyed more favorable experience than its actuaries assumed, or both, surplus assets will almost certainly exist. The Respondents, Messrs. Tilley, et al. ("Employees"), claim a right to part of such a surplus although they made no contributions to the plan at issue and their employer — Petitioner, The Mead Corporation ("Mead") — bore all the risks.

II. FACTS

The facts are undisputed. Pet. App. 4a, 10a. The Employees are six former salaried workers of the Lynchburg Foundry Company (the "Foundry"), previously a wholly-owned subsidiary of Mead. They were participants in Mead's Industrial Products Salaried Retirement Plan (the "Plan"), a tax-qualified, single-employer, defined benefit pension plan funded entirely by Mead. J.A. 24-93.

The Plan's normal retirement age was 65. Under Article V Section 2(b) of the Plan, however, a participant who had completed 30 years of service and who had attained age 62 while in the service of Mead could retire then with an early retirement benefit based upon the retiree's years of service without any actuarial reduction because benefits would begin before age 65. J.A. 39. The opportunity to receive unreduced payments sooner than at age 65 has value; that value is generally referred to as a "subsidized" early retirement benefit. Many defined benefit plans provide such a feature.

In 1983 Mead sold the Foundry to a new owner, severed the Employees' service with Mead, and terminated the Plan. R. 10, Attach. 2, pp. 1-4; R. 15, pp. 1-2; R. 16, p. 1; R. 32, pp. 2-3. At the time of Plan termination, none of the Employees had satisfied the Plan's criteria for unreduced early retirement benefits.[2] All participants who had satisfied the Plan's age and service requirements for early retirement received their unreduced early retirement benefits under Article V Section 2(b) of the Plan. R. 32, p. 2. Each of the Employees and other participants who had not satisfied the Plan's age and service requirements for early retirement received the value of their normal retirement benefits payable at age 65 based on their completed years of service on the date

[2] Five of the Employees had each worked more than 30 years at the time the Plan was terminated, but none had reached the age of 62; one of these, Mr. Wall, died before reaching age 62. R. 10, Attach. 2, p. 5; A. 15. The sixth, Mr. Crotts, had 28 years of service and was 61 years of age when the Plan terminated. R. 10, Attach. 2, p. 5.

of the Plan termination. These sums were sizeable, but they included no portion of the value of the subsidized early retirement feature of the Plan.[3]

There was $10,799,000 left in the Plan's fund after the payment of all benefits and other liabilities. R. 19, p. 29. This surplus reverted to Mead (R. 19, pp. 28-29), as specifically permitted under the terms of the Plan. Art. VIII § 4(f). J.A. 63. Prior to the actual termination, Mead sought approval from both the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service ("IRS"). The PBGC issued a Notice of Sufficiency in November 1983. Pet. App. 32a. It constituted a ruling that Plan assets were sufficient to pay out all legally required benefits and that reversion of the surplus to Mead was proper under Title IV of ERISA.[4] Subsequently the IRS issued a favorable "determination letter" which constituted a ruling that all benefit liabilities to Plan participants had been satisfied under the requirements of the Internal Revenue Code (the "Code"). Pet. App. 30a. *See* note 42, *infra*.

On June 15, 1984, the Employees filed suit against Mead in state court. R. 5. Mead removed the case to the United States District Court for the Western District of Virginia. R. 1. The Employees then filed an amended complaint alleging violations of ERISA and seeking a portion of the subsidized early retirement benefits as damages. R. 15. The ERISA claims were submitted to the district court on cross-motions for summary judgment (R. 24, 31) directed primarily at the question of liability. The issue of damages was not fully briefed, nor

[3] *Tilley* v. *Mead Corp.*, 815 F.2d 989, 990-91 (4th Cir. 1987) (Pet. App. 2a-4a). Each of the Employees elected to receive their benefits in actuarially equivalent lump-sums; Mr. Tilley received $87,108.74; Mr. Wall $65,360.80; Mr. Crotts $87,552.03; Mr. Reed $69,882.45; Mr. Weddle $50,800.35; and Mr. Goode $83,923.93. R. 10, Attach. 2, pp. 3-4; R. 19, p. 7; R. 32, pp. 2-3.

[4] In 1983 ERISA required express PBGC approval of the proposed termination before plan assets could be distributed as Mead proposed. ERISA § 4041(b), 29 U.S.C. § 1341(b) (as in effect in 1983). The procedure is different today. *See* ERISA § 4041(b), 29 U.S.C. § 1341(b) (1988).

was it supported or opposed by testimony or affidavits. R. 24, 25, 31, 32; R. Vol. III (Hearing Transcript).

III. DECISIONS BELOW

The district court entered final judgment denying the Employees' motion and granting Mead's motion. Pet. App. 9a. In its opinion the court held that "[t]he Plan's language, the legislative history, and the caselaw in the fourth circuit . . . clearly demonstrate that early retirement benefits are not 'accrued benefits' under ERISA[,]" and thus, that the subsidized early retirement benefits sought were not payable to the Employees upon plan termination. Pet. App. 11a, 12a, 14a. The district court also held that reversion of the surplus assets to Mead was authorized by both ERISA § 4044(d)(1) and Section 4(f) of the Plan. Pet. App 14a. Because the district court ruled that Mead was not liable, it did not address the issue of damages or the method by which damages might be computed. Pet. App. 10a-15a.

The Employees appealed. The Fourth Circuit reversed and held that upon plan termination Title IV of ERISA prohibited reversion of any plan assets to Mead until it had paid early retirement benefits to the Employees, "*even if those benefits were not accrued at the time of termination.*" *Tilley*, 815 F.2d at 991 (emphasis added) (Pet. App. 5a).

As sole statutory authority for its holding, the court below relied upon ERISA § 4044(a), which ranks the order in which assets must be allocated among six categories of benefits under a terminating plan; the last of these six categories consists of "all other benefits under the plan." ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6) (1974) ("Category 6"). A. 1-2.[5]

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[5] Because the Fourth Circuit based its holding entirely on its construction of Category 6, it never reached the Employees' alternative arguments (rejected by the district court) that: (1) the subsidized early retirement benefits were "accrued benefits" or "contingent liabiliites" which must be paid before the surplus could revert; and (2) that the surplus in this case could not revert because it was not due to "actuarial error." These arguments could, if accepted, constitute alternative grounds for sustaining the result reached below; accordingly, they are dealt with in Sections II and III of this brief, *infra*.

In construing Category 6 as creating a substantive right to recover the unearned early retirement benefits at issue here, the court below adopted a dictum in *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986). That dictum treats the legislative history of Category 6 as compelling the conclusion that " 'Congress . . . decided not to limit the allocation requirement to accrued benefits but to require that, *as long as assets were available, they should be used to meet partcipants' benefit expectations based upon the [p]lan's full benefit structure.*' " *Tilley*, 815 F.2d at 992 (quoting *Amato*, 773 F.2d at 1416) (emphasis added) (Pet. App. 6a).

The Fourth Circuit went on to hold that the Employees' early retirement benefits must be paid in a lump sum and specified the method for calculating that lump sum. *Tilley*, 815 F.2d at 992 (Pet. App. 7a). Both of these holdings were made despite the fact that the evidence before the district court on damages was scant and inadequate, the issue had not been addressed by the district court, and had not been raised, briefed, or argued as an issue on appeal. R. 24, 25, 31, p. 2 n. 1, 32. Pet. App. 9a-15a, A. 7-10. Supported by the PBGC, Mead filed a timely petition for rehearing which was denied by the Fourth Circuit. Pet. App. 17a.[6]

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[6] Since *Tilley* two other courts of appeals have issued decisions expressly rejecting the interpretation of Category 6 by the *Amato* and *Tilley* courts and holding that Category 6 does not entitle employees to unearned pension benefits at plan termination. *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *vacated, reh'g granted*, 836 F.2d 1571, *op. on reh'g*, 848 F.2d 1164 (11th Cir. 1988) (en banc); *Ashenbaugh* v. *Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3d Cir. 1988). These cases are discussed, *infra* at n. 24. While these appellate cases were pending, at least eight other lawsuits advancing similar claims for unaccrued retirement benefits were instituted in various district courts, including a follow-on class action by other employees covered by the Mead Plan. *Linkous* v. *The Mead Corp.*, No. 87-C165-R (W.D. Va. filed Apr. 24, 1987). *See* Mead's Petition for Certiorari at 17, n. 39; PBGC's Amicus Curiae Brief filed in Support of Mead's Petition at 3-4, n. 2; Mead's Supplemental Brief on New Third Circuit Opinion at 2, n. 3.

SUMMARY OF ARGUMENT

There was nothing remarkable about this case until the Fourth Circuit seized upon ERISA § 4044(a)(6), a narrow and inapposite ordering provision contained in Title IV of that statute, to create new substantive rights for employee-participants of terminating defined benefit plans. According to the court below, the surplus assets remaining in the Plan at termination must be used to satisfy the Employees' "benefit expectations" with respect to subsidized early retirement benefits even though they had not met, and indeed could never meet, the eligibility criteria spelled out in the Plan for earning that benefit.

None of the accepted tools of statutory construction can properly be used to reach such a result. The primary goal of the ERISA Congress was not to limit reversion of surplus assets to employers at plan termination, but rather to assure that promised benefits are funded and paid. To this end ERISA imposed minimum funding levels for pension plans and, in Title IV, created the PBGC to oversee termination of defined benefit plans and to guarantee payment of employees' benefits when plans terminate with insufficient assets. The plain language of section 4044, the structure of the statute, and direct legislative history all establish that section 4044 was meant to operate only as an ordering provision that allocates the assets of a terminated plan: first, to PBGC-guaranteed benefits; next, to other benefits earned before termination; and finally, in Category 6, to benefits provided under the plan that vest upon plan termination. The specific language of Category 6 allocating assets to "all other *benefits under the plan*" cannot properly be read to convert the Employees' expectations about benefits they might earn through future service into benefits that have been earned "under the plan." To do so would both disrupt the intended allocation of assets covering vested benefits and nullify the express permission in ERISA § 4044(d)(1) for reversion of surplus assets to employers. The latter result necessarily imputes to Congress an intention to do indirectly that which it has repeatedly

refused to do directly, including in ERISA itself — that is, to enact an outright ban on surplus asset reversions.

The only evidence of Congressional purpose relied upon below was the disappearance of the adjective "accrued" from one of the asset allocation subsections contained in a bill that was one of ERISA's predecessors. Policy, reason, and precedent require more than this to support such a sweeping change in settled federal pension law. Recognizing all of this, each of the federal agencies charged with responsibility for administering ERISA has consistently stated that unearned pension benefits do not fall within section 4044(a) and do not constitute plan liabilities that must be paid when a plan terminates. These agency views were ignored below in spite of the established rule that they should command deference from the courts.

The decision below is at odds with Congressional policy. As this court has recognized, ERISA sought "to ensure that 'if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — . . . he actually receives it.' " *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) (quoting *Nachman*, 446 U.S. at 375). These Employees received all promised benefits they had earned by fulfilling Plan requirements; since they had not fulfilled the requirements for subsidized early retirement benefits, they had no entitlement to them nor any legitimate expectation of receiving them.

The actuarial assumptions used in funding defined benefit plans never precisely match actual plan experience. Employers are obligated to increase their contributions when necessary and are permitted to decrease those contributions when the plan's experience is more favorable than their actuaries have assumed. It is implicit in this funding scheme that, if the plan terminates at a time when its assets exceed the benefits earned to date, the employer may recover the excess. Any contrary rule creating additional plan liabilities that

exceed benefits earned under the plan will adversely affect all defined benefit plans. If the Fourth Circuit's decision is upheld, employers will be more reluctant to establish new defined benefit plans, and employers maintaining such plans will tend to decrease their funding levels to the absolute minimum required under ERISA. This, in turn, increases the likelihood that such plans will terminate with insufficient assets — a result that benefits no one. Recent well reasoned federal appellate decisions have rejected the interpretation of Category 6 adopted below, and this Court should do so as well.

The Employees' alternative arguments fare no better. Their claim that the unearned early retirement benefits at issue in this case are "accrued benefits" is wrong. Under ERISA an employee's normal retirement benefit accrues every year. No other benefit accrues this way. The legislative history of ERISA reveals that Congress carefully considered whether to require that early retirement benefits also be treated as benefits that accrue every year, but it rejected the idea. Subsequent to the Mead Plan termination, Congress chose, as part of the Retirement Equity Act of 1984 ("REA"), to give limited protection to early retirement benefits that are cut back or eliminated by plan amendments or plan terminations occurring after July 30, 1984. Even if REA had applied to the termination of the Mead Plan, it would have made no difference. Under REA plan participants who, like the Employees, were separated from service with the employer and received their retirement benefits without having satisfied the plan's requirements for an early retirement benefit, would never be entitled to receive that benefit. REA thus stands as the best evidence that the Fourth Circuit's holding is wrong, for Congress would not have acted affirmatively after ERISA to add limited protection for early retirement benefits if ERISA in fact had already contained the sweeping protection for them found by the court below.

The Employees' claim that their unearned early retirement benefits represent "contingent liabilities" that had to be paid

before the surplus could revert is equally incorrect. IRS rulings and regulations — the source of the duty to pay "contingent liabilities" — provide no support for the Employees' position and, in fact, confirm that unearned early retirement benefits are not protected under this rubric either, as demonstrated by the IRS approval of the termination of the Mead Plan at issue.

The Employees also failed to convince the district court that the surplus remaining in the Plan could not properly revert to Mead because it did not result from "actuarial error." IRS rulings and regulations, again the sole source for the doctrine, make it clear that a surplus arising on plan termination because of the normal interplay of the many actuarial assumptions underlying the funding of defined benefits is treated as caused by "actuarial error." Under these IRS rules and the cases applying them, the reversion here was entirely proper.

Finally, the Fourth Circuit abused its discretion by reaching the issue of damages and deciding how they should be calculated. The damages issue posed complex factual questions never addressed by the district court. It was not briefed or argued in the court of appeals, where the Employees flatly stated that "the lower court record is not sufficient to pursue a damage claim on the appellate level[,] . . . and damages are not even the issue in this appeal." *See infra* at 47. The Fourth Circuit's decision to tackle the issue for the first time on appeal was fundamentally unfair to Mead and should be reversed because "injustice was more likely to be caused than avoided by deciding the issue without [Mead's] having had an opportunity to be heard." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976).

ARGUMENT

I. THE COURT BELOW ERRONEOUSLY HELD THAT SECTION 4044(a)(6) OF ERISA GRANTS SWEEPING SUBSTANTIVE RIGHTS FOR EMPLOYEES TO RECOVER BENEFITS THEY HAVE NEVER EARNED AND WILL NEVER EARN WHENEVER A PENSION PLAN TERMINATES WITH SURPLUS ASSETS.

A. Before ERISA a Reversion to an Employer Was Permitted if All Benefits Accrued at Plan Termination Were Vested and All Liabilities of the Plan Were Paid.

Before ERISA was passed in 1974, it was clear under the Code that reversion of surplus assets to employers upon plan termination was perfectly proper once the liabilities of the plan were paid.[7] In 1962 Congress added to the Code the requirement that a qualified plan must provide "that, upon its termination . . ., the rights of all affected employees to benefits accrued to the date of such termination . . . are nonforfeitable." Code § 401(a)(7). These Code provisions were incorporated in the Mead Plan. J.A. 63-64.

B. It Was No Part of the Policy or Purpose of ERISA to Change the Rules Permitting Employer Reversions of Surplus Assets Upon Plan Termination.

The protections of Pre-ERISA law continue in force today. ERISA did not change Code § 401(a)(2), and Code § 401(a)(7) was re-enacted by ERISA as Code § 411(d)(3).

[7] Code § 401(a)(2). This section was first enacted as section 165(a)(2) of the Internal Revenue Code of 1939, effective January 1, 1940.

Pre-ERISA law, however, did not require any minimum levels of funding for pension plans, and there was thus no assurance that if a qualified plan did terminate assets would be available to pay the benefits that employees had accrued. A paramount concern of the ERISA Congress was to alter this state of affairs.

Among its major reforms, ERISA imposed minimum vesting standards (ERISA § 203; Code § 411), established minimum funding requirements (ERISA § 302; Code §§ 412, 4971), established uniform federal fiduciary standards (ERISA §§ 401-408; Code § 4975), and "created the [PBGC] and a termination insurance program to protect employees against the loss of 'nonforfeitable' benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full." *Nachman*, 446 U.S. at 361 n. 1.

Although the ERISA Congress had several proposals before it to eliminate reversions — none of which passed (*see infra* at 21-24) — its principal concern was to assure that promised benefits were funded and paid. ERISA did include one new rule dealing with reversions in section 4044 itself, a provision requiring that a terminating contributory defined benefit plan must distribute surplus assets attributable to the employees' contributions to the employees who made them. ERISA § 4044(d)(2) (1974). Aside from this specific exception, "Congress did not seriously consider extending this principle — that participants should share in a plan's excess assets — to noncontributory plans" such as Mead's defined benefit Plan. Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 Am.J. of Tax Policy 117, 126 (1986) (footnotes omitted).

It is thus understandable that neither the Employees nor the Fourth Circuit could find any support in the general purposes or background of ERISA for allowing recovery of unearned, unaccrued early retirement benefits before the Plan surplus could revert to Mead. None exists.

C. Section 4044 of ERISA Is Purely An Allocation Provision Setting The Order in Which Assets Must be Used At Termination, and It Expressly Permits Reversions.

The language and structure of section 4044, a key provision of Title IV, compel a conclusion contrary to that reached below. The title of the section, "Allocation of Assets," aptly describes its sole function. Congress was not creating new, substantive rights for plan participants. Rather, subsection 4044(a) establishes the order of priority for distributing assets of a terminating plan by directing the "plan administrator [to] allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries" in a specified order through six categories of benefits. Subsection 4044(d)(1) expressly sanctions reversion of surplus assets to the employer:

> Any residual assets of a single-employer plan may be distributed to the employer if —
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
> (B) the distribution does not contravene any provisions of law, and
> (C) the plan provides for such a distribution in these circumstances.

A. 2. ERISA § 4044(d)(2) placed specific restrictions on reversions with respect to contributory plans. *See supra* at 13. Surveying this landscape and citing section 4044(d)(1), Professor Stein concludes that "federal law does permit an employer (1) to *terminate* its pension plan; (2) to cause the plan to satisfy its liabilities . . . and then (3) to recover any remaining plan assets." Stein, at pp. 117-18 (emphasis in original).

Nothing in section 4044(d) suggests that the "liabilities of the plan" that must be satisfied before there can be a reversion of excess assets are created or defined by section 4044(a).

Rather, that reference mirrors the Code's pre-ERISA rules that were reenacted without change in ERISA.

The critical language is in Category 6, which describes the lowest asset-allocation category as "all other benefits under the plan." It is wrong to conclude that by using this phrase Congress was directing employers to pay "benefit expectations" with respect to either unearned early retirement benefits (as the court below and the *Amato* court believed) or unearned normal retirement benefits (as the Eleventh Circuit panel decision in *Blessitt* held). It is far more logical to conclude, as did the en banc *Blessitt* opinion, that the phrase "under the plan" was limiting language meant to require that any benefits within Category 6 must have been earned in accordance with the terms of the plan. *See Blessitt*, 848 F.2d at 1169, 1170, 1171. The latter approach is consistent with this Court's rulings that the ERISA Congress sought to ensure payment of promised, defined benefits " 'if a worker . . . has fulfilled whatever conditions are required to obtain a vested benefit. . . .' " *Alessi*, 451 U.S. at 510 (quoting *Nachman*, 446 U.S. at 375). The ERISA Congress, except where it expressed a contrary intent in specific terms, meant to embrace and enforce plan terms defining the benefits earned, not to sweep them aside.

The limited purposes of section 4044 are apparent from ERISA's legislative history. First and foremost, the allocation scheme set forth in section 4044(a) is designed "[t]o protect against evasion of the . . . limits on the [PBGC's] insurance benefits by use of pension assets to first pay uninsured benefits." S. Rep. No. 93-383, 93d Cong., 2d Sess. 84 (1974), *reprinted in* I Legislative History of [ERISA] at 1152 (1976) ("Leg. Hist.").[8] To that end, section 4044(a) assigns these guaranteed benefits to the first four asset alloca-

[8] Subject to dollar and phase-in limitations contained in ERISA § 4022(b), ERISA § 4022(a) requires the PBGC to guarantee payment of "all nonforfeitable benefits (*other than benefits becoming nonforfeitable*

tion categories. ERISA § 4044(a)(1)-(a)(4), 29 U.S.C. § 1344(a)(1)-(a)(4).[9] A second purpose of section 4044 is to ensure that *nonforfeitable* (*i.e.*, vested) benefits not fully guaranteed by the PBGC will be paid before *forfeitable* benefits if plan assets are insufficient to pay both. Accordingly, section 4044 assigns nonforfeitable benefits not guaranteed by the PBGC to category 5, which includes "all other nonforfeitable benefits under the plan," (ERISA § 4044(a)(5)), and "all other benefits under the plan" to Category 6.

Category 6 is the only allocation category to include any forfeitable benefits. Such benefits include those that have accrued but have not yet vested under a plan's vesting schedule prior to termination but which automatically vest at termination by virtue of Code § 411(d)(3) and corresponding plan provisions such as Article XIII, § 4(h) of the Mead Plan.[10] *See* note 8, *supra*. Category 6 also includes all other benefits that become payable under the express terms of the plan solely upon plan termination.

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solely on account of the termination of a plan) . . . ." 29 U.S.C. § 1322(a) (emphasis added). ERISA § 4001(a)(8) now defines "nonforfeitable benefit" to mean, "with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter . . . ." 29 U.S.C. § 1301(a)(8). *See also* 29 C.F.R. § 2618.2 (1987).

[9] The first four priority categories were aptly summarized by the Eleventh Circuit's en banc *Blessitt* decision:

> *Category 1*: The portion of an employee's accrued benefits derived from voluntary employee contributions.
>
> *Category 2*: The portion of an employee's accrued benefits derived from mandatory employee contributions.
>
> *Category 3*: Annuity benefits that were or could have been in 'payout' status three years before the plan terminated. (*i.e.*, benefits that retired workers were receiving or could have received had they chosen to retire within the three years immediately prior to the termination date).
>
> *Category 4*: All other benefits guaranteed by the PBGC.

848 F.2d, at 1168.

[10] For example, under Code § 411(d)(3) an employee who had worked for nine years at the time Mead's Plan terminated automatically became vested to the extent of his nine years of benefit accrual, despite the Plan's 10-year service requirement for vesting. At termination of the Plan, that employee's accrued benefit was paid out of assets allocated to Category 6.

The "benefit expectations" theory adopted below disrupts the carefully crafted allocation scheme set out in section 4044(a). For at least two reasons that scheme simply will not work as Congress intended if Category 6 transforms " 'participants' benefit expectations based upon the Plan's full benefit structure' " into binding obligations payable at plan termination. *Tilley*, 815 F.2d at 992 (quoting *Amato*, 773 F.2d at 1416 (Pet. App. 6a).

First, the value of nonvested benefits accrued before plan termination (*i.e.*, forfeitable benefits) are included in Category 6. *See supra* at 16. If such benefits must be added to all future retirement benefit expectations, assets remaining after satisfying category 5 benefits are not likely to satisfy all Category 6 benefits. This would clearly short-change employees with nonvested accrued benefits at plan termination. As the Eleventh Circuit stated in rejecting the "benefit expectations" theory —

> Under [that] theory, the claims of unvested workers with accrued benefits — i.e. benefits based on the actual years of service — would fall into the same category (6) with the claims based on anticipated future years of service not actually worked. Thus the former claims based on actual service would have to compete with the latter claims. And, where plan assets were not sufficient to meet all Category 6 claims, the more legitimate claims based on actual service would be diluted by the more speculative claims based on future service not actually worked.

Blessitt, 848 F.2d at 1176. If Congress had intended to include "benefit expectations" in the asset allocation scheme, it no doubt would have created a "category 7" for them, giving

preferential treatment in Category 6 to benefits actually earned but not vested just prior to plan termination.

Second, unless all employees are near retirement age, the value of projected "benefit expectations" would, of necessity, be extremely large. Category 6 benefits would thus consume all remaining assets, nullifying for all practical purposes the express permission for reversions in ERISA § 4044(d)(1). For example, if a plan provides a benefit at age 65 of $10 per month for each year of service, an employee who began working at age 25 would "expect" a retirement benefit of 40 x $10 or $400 per month at age 65. If, however, the plan terminated when the employee was 35 and had earned only 10 x $10 or $100 per month beginning at age 65, plan assets would have to be used to satisfy a benefit expectation four times the size of the one actually earned. Because "liabilities" of this magnitude would quickly absorb all plan assets, section 4044(d)(1) would cease to have any real application. *See Blessitt*, 848 F.2d at 1176-77 (the "effect of [the 'benefit expectations' theory] would be to eliminate for all practical purposes all reversions to employers").

Both results — impairment of the rights of employees whose accrued benefits vest by operation of law at termination, and virtual nullification of section 4044(d)(1) — flow directly from *Amato* and the decision below. They vitiate section 4044's purposes rather than furthering them.[11]

D. The Court Below Improperly Relied Upon The Unexplained Disappearance of the Word "Accrued" from One of ERISA's Predecessor Bills.

In early 1974 both the House and Senate passed versions of

[11] They also violate the principle that statutes should not be interpreted so as to render one part inoperative. *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). *See also Central Mont. Elec. Power Co-Op, Inc.* v. *Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1478 (9th Cir. 1988) (courts must avoid statutory construction that renders any section superfluous and does not give effect to all words used by Congress).

H.R.2.[12] The differences between these bills were resolved in the conference substitute which became ERISA. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), III Leg. Hist. at 4277. The asset allocation provisions of the House and the Senate bills (*i.e.*, the predecessors of ERISA § 4044(a)) were markedly different. The House bill was more complex, with seven asset allocation categories. The fourth of these included the present value of "accrued" benefits not payable under higher priority categories. H.R.2, 93d Cong., 2d Sess. § 112(b)(4)(1974), III Leg. Hist. at 3958. The House bill then allocated assets in excess of those needed to fund through the fourth category successively to: assets attributable to investment earnings on employee contributions, § 112(d)(1); benefits that "the plan may set forth as being payable only if the plan terminates," § 112(d)(2); and, finally, to a category *permitting* a reversion if the plan so provided, or a pro-rata distribution to participants if it did not, § 112(d)(3). *See* III Leg. Hist. at 3960-61, and *infra* at 22-23.

In contrast the Senate version of H.R.2 contained four asset allocation categories covering only PBGC-insured benefits. H.R.2, 93d Cong., 2d Sess. § 444 (1974), III Leg. Hist. at 3720-21. Another provision of the Senate bill expressly approved reversions of surplus assets. *Id.*, § 522(b), III Leg. Hist. at 3793.

Section 4044(a) emerged from conference with the six allocation categories described above. H.R. Conf. Rep. No. 1280, III Leg. Hist. at 4504-07, 4642. The Conference Committee's Joint Explanatory Statement describing both versions of H.R.2 and the conference substitute offers no explanation for the format chosen for section 4044(a), nor does it discuss the approval of reversions contained in section 4044(d)(1).[13]

[12] H.R.2, 93d Cong., 2d Sess. (1974), III Leg. Hist. at 3898; H.R.2, 93d Cong., 2d Sess. (1974), III Leg. Hist. at 3599.

[13] Comments of the Administration and congressional staff on the House and Senate asset allocation provisions and the conference substitute say

The Second Circuit in *Amato* and the court below both fastened on the disappearance of the adjective "accrued" from section 112(b)(4) of the House version of H.R.2. Both courts drew an incorrect analogy between that subsection of the House bill and Category 6 of ERISA in order to conclude that " 'Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.' " *Tilley*, 815 F.2d at 992 (quoting *Amato*, 773 F.2d at 1416) (Pet. App. 6a).

The legislative history contains no express statement that Congress was attempting, through deletion of the word "accrued" in the House bill, to include benefit expectations in Category 6 or to alter longstanding Code principles defining plan liabilities and governing the permissibility of reversions. If Congress intended to expand the existing definition of plan "liabilities" by its enumeration in section 4044(a) of the priority allocation scheme, it would certainly have said so. The ERISA Congress did change existing law in a number of significant ways, and it was extremely clear about each of those major doctrinal changes.[14] Congress gave no hint to employers sponsoring defined benefit plans that Category 6 somehow mandated payments at plan termination that would exceed benefits actually earned or accrued.

Finally, ERISA's legislative history shows that inclusion of the adjective "accrued" in Category 6 would have been too limiting. Section 112(d)(2) of the House bill contained a separate allocation category for benefits that "the plan may

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merely that section 4044(a) combined the best features of both bills. *See* III Leg. Hist. at 5047, 5167; 5205, 5225-26.

[14] *Compare* the discussion of Category 6, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 375 (1974), III Leg. Hist. at 4642, *with* the discussions on: vesting, *id.* at 267-79, III Leg. Hist. at 4534-46; prohibited transactions, *id.* at 306-23, III Leg. Hist. at 4573-90; and salary reduction plans, *id.* at 355-56, III Leg. Hist. at 4622-23.

set forth as being payable only if the plan terminates". III Leg. Hist. at 3960. Such provisions — for example, an extra benefit payable only at plan termination — are in fact common and the House correctly did not describe such benefits as "accrued." *See supra* at 19. They are included in Category 6.

Amato and the court below thus performed a perfunctory and incorrect analysis of the legislative history of Category 6. Just as important, however, both courts erred in attaching decisive significance to the disappearance of one word from an unenacted bill. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 474 (11th Cir. 1984) ("Unexplained changes made in committee are not reliable indicators of congressional intent."). Without some very specific guidance somewhere in ERISA's massive legislative history, it was simply wrong to rely on the deletion of the word "accrued" as the signal for a major change in settled pension law.

E. Before ERISA, During Consideration of ERISA, and After ERISA, Congress Has Repeatedly Rejected Proposals to Eliminate Reversions.

Before, during, and after ERISA, Congress has considered employer reversions of surplus assets not needed to pay accrued benefits at plan termination. Reversions have never been outlawed, and Category 6 thus cannot be read to have indirectly done so.

House proposals preceding the Internal Revenue Acts of 1938 and 1942 would have prohibited reversions of residual assets to employers. On both occasions, the Senate rejected that approach and the House acceded to the Senate view in conference.[15]

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[15] The House version of the bill that became the 1938 Revenue Act contained a provision that would have prohibited any reversion of residual

As explained above, ERISA expressly permits reversions. ERISA was an amalgam of many different pension reform bills and proposals. On the Senate side, one of these bills, S.1557, contained a provision creating a general rule against reversions. S. 1557, 93d Cong., 1st Sess., § 14 (1973), I Leg. Hist. at 307. It was never passed, and the broad prohibition on reversions did not find its way into ERISA. Instead the Senate version of H.R.2 added the provision permitting reversions that was the forerunner of section 4044(d)(1) of ERISA. *See supra* at 19.

On the House side, H.R.2, as introduced on January 3, 1973, contained an unambiguous prohibition against distributing residual assets to an employer. H.R.2, 93d Cong., 1st Sess., § 111(e) (1973), I Leg. Hist. at 44. Another House bill introduced on August 2, 1973, also contained language that could be read to prohibit reversions. H.R. 9824, 93d Cong., 1st Sess., §§ 111, 112 (1973), I Leg. Hist. at 724, 738. But when H.R.2 was reported out of the House Committee on Education and Labor, the prohibition against reversions was dropped. The Committee instead added the limited prohibition on reversions with respect to contributory plans that became ERISA section 4044(d)(2), and adopted language that would have allowed reversions if the Secretary of Labor found that certain asset allocation rules had been met. H.R.2, 93d Cong., 1st Sess., §§ 112(g), 112(i) (1973), II

assets upon termination of a pension plan. *See* H.R. Rep. No. 75-1860, 75th Cong., 3d Sess. 46-47 (1938). The Senate, however, changed that approach,

> . . . *a change which is deemed advisable in fairness to employers . . . . [I]t is quite possible that after satisfaction of all pension liability under the trust, an additional amount of funds of the trust will remain, due to erroneous actuarial computations during the previous life of the trust. It seems desirable to allow the employer to provide for the return of such an amount* in the trust without the trust losing its exempt status under Section 165[(a)(2)].

S. 1567, 75th Cong., 3d Sess. 24 (1938) (emphasis added). Four years later, this exact history was repeated. *See* H.R. 2586, 77th Cong., 2d Sess. 52 (1942).

Leg. Hist. at 2294-95.[16] The version of H.R.2 passed by the House contained both these provisions. In Conference the requirement of Labor Department approval was discarded in favor of the language now found in ERISA § 4044(d)(1). This, of course, was the same Conference that fashioned the language of Category 6.

Since ERISA, Congress has been under considerable pressure to prohibit reversions. Congress has opted in every case for indirect limitations on employers' ability to terminate plans and recover surplus assets.[17] None of these limited legislative responses to the reversion issue would be either rational or required if Congress had, through enactment of Category 6 in 1974, already mandated that surplus assets be used to pay benefit expectations not yet accrued.

Even if the "benefit expectations" theory can be confined to the unearned subsidized early retirement benefits sought by the Employees in this case, Congress has unequivocally shown that such expectations were not protected under ERISA. In section 301(a) of the Retirement Equity Act of 1984, Pub. L.

[16] The House Education and Labor Committee Conference Report on H.R. 2 as reported, stated "[a]ny remaining assets [after satisfaction of liabilities] would be returned to the employer if the plan so provides." *See also* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 22 (1973), II Leg. Hist. at 2369.

[17] For example, in 1986 Congress added Code § 4980 imposing a 10% excise tax on reversions occurring after December 31, 1985. In 1987 Congress passed the Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203, 101 Stat. 1330 (1987) ("OBRA 1987"). The Conference Committee rejected provisions in the bills of the House Education and Labor Committee and the Senate Labor and Human Resources Committee that would have allocated to employees most of the surplus assets in terminating plans. *See* H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. at 870-71 (1987). However, OBRA § 9311(a)(1) did amend ERISA § 4044(d) to prohibit any reversion unless plan terms permitting it had been in the plan for five years. Similarly, a proposed Senate amendment (S. 2238 § 799) that would have imposed a 60% tax on reversions was rejected in favor of section 6069 of the Technical Corrections and Miscellaneous Revenue Act of 1988, Pub.L. No. ____, ____ Stat. ____ (Nov. 11, 1988), which increased the 10% reversion tax to 15%.

No. 98-397, 98 Stat. 1426 (1984) ("REA"), enacted after the Mead Plan termination, Congress amended ERISA to provide limited, specific statutory protection for subsidized early retirement benefits. When a plan is terminated under circumstances where employment with the plan sponsor continues, REA gives each employee the opportunity *to earn* subsidized early retirement benefits if, at a later date after plan termination, the employee fulfills the particular age and service criteria set forth in the plan. Congress would hardly have found it necessary to enact a new statute providing protection for *earned* subsidized early retirement benefits with respect to plan terminations after July 30, 1984, if, as the Fourth Circuit believed, the law before July 30, 1984, required payout on plan termination of *unearned* early retirement benefits. The decision below can be correct only if the law prior to REA required more generous benefit payouts than the law after REA requires. This anomalous result cannot have been the intent of the Congress that enacted REA, for it undoubtedly meant to expand benefits, not contract them.[18]

F. The Federal Agencies Administering ERISA All Disagree with the Employees' Claim that Unearned Benefits are Payable upon Plan Termination.

The PBGC has primary oversight responsibility for defined benefit plan terminations. Since 1975 it has consistently taken the position that Category 6 includes only benefits accrued under the terms of the plan at the time of termination. In that year the PBGC's preamble to proposed regulations under section 4044 expressly stated that "priority category 6 will contain the value of *accrued forfeitable benefits* of a participant." 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975) (emphasis added). The PBGC has reiterated this position in several opinion letters,[19] and in amicus curiae briefs filed in this Court and in the courts of appeals. The PBGC has supervised over 50,000 pension plan terminations since 1975 — including the one at issue here (*see supra* at 5) — and to our knowledge has never required an employer to pay "benefit expectations" of any kind before permitting a reversion of surplus assets to the employer under section 4044(d)(1).[20] If the PBGC's position has been incorrect, employees can look to it for the monumental task of recalculating all benefits and reversions.[21]

Acting together, the Department of Labor ("DOL"), the IRS, and the PBGC issued Joint Agency Implementation Guidelines in May of 1984 describing how employers could terminate plans, recover surplus assets, and re-establish plans for the same employees. *See* 11 Pens. Rep. 724 (BNA) (May 28, 1984). Although the Guidelines do not directly interpret section 4044, they clearly require that only employees' "accrued benefits" in the terminating plan be fully vested and protected by the purchase of annuity contracts before excess assets may revert to the employer. *Id.* If the IRS, PBGC, and DOL viewed unearned benefit expectations as payable on

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[18] In *Ashenbaugh*, the Third Circuit relied upon REA to support its decision denying the employees' claim for unearned early retirement benefits, fully appreciating the legal significance of the conflict between REA's limited protection of subsidized early retirement benefits and the broad relief sought by the employees. 854 F.2d at 1527-28. For a more detailed discussion of REA, see *infra* at 37-40.

[19] PBGC Opinion Letters 87-11 (Oct. 22, 1987); 86-5 (Mar. 6, 1986); 86-1 (Jan. 15, 1986); 85-28 (Dec. 2, 1985); 85-9 (Apr. 5, 1985); PBGC Opinion Letter 82-28 (Oct. 15, 1982).

[20] PBGC statistics on reversions, which are compiled only for "large" cases where asset reversions to employers exceed $1 million, show that from 1980 through 1987, 1,635 such plans have terminated. These "large" cases alone involved some $40 billion in assets; 1.8 million employees received almost $22 billion in accrued, or earned, benefits, and the sponsoring employers received more than $18 billion in surplus asset reversions. The situation is undoubtedly similar for thousands of "smaller" plans. PBGC Amicus Brief in Support of Mead's Petition for Certiorari at 3.

[21] ERISA § 4003(f) permits an employee to sue the PBGC for equitable relief if its actions have "adversely affected" the participant.

plan termination, the Guidelines would have required that such benefits be protected.[22]

Neither before ERISA nor since has the IRS ever, to our knowledge, disqualified a terminating defined benefit plan for failing to pay unaccrued benefits to employees. The IRS's favorable ruling on the Plan termination at issue (*supra* at 5) is fully consistent with this longstanding view. Moreover, the decision below and the *Blessitt* panel decision were of such concern to the IRS that it suspended ruling on plans terminated during August and September 1987 in order to study the issues. *See Plan Terminations on Hold in Fourth, Eleventh Circuits,* 14 Pens. Rep. 1107 (BNA) (Aug. 24, 1987). On September 25, 1987, the suspension was lifted with the issuance of a General Counsel Memorandum stating that "Section 4044(a) of ERISA, with its allocation requirements, should not be seen as increasing the term liabilities to include 'benefit expectations.' " Gen. Couns. Mem. 39665 at 2 (Sept. 25, 1987). The General Counsel Memorandum also specifically declared that the IRS would not be bound by the Eleventh Circuit's panel decision in *Blessitt. Id. See also* Rev. Rul. 80-229, 1980-2 C.B. 133 (1980) (assets in excess of "the present value of the accrued benefit" may properly revert).

Finally, in asset reversion hearings conducted by the Senate Select Committee on Aging in 1983, representatives of both the IRS and the DOL clearly stated that ERISA permitted reversion of surplus assets to the employer once accrued benefits had been paid. Alan D. Leibowitz, Acting Administrator, Pension and Welfare Benefit Programs, for the DOL testified that these reversions were proper under Title I of ERISA, and that —

> the provisions of ERISA make clear that where there is overfunding and where the plan so provides, *the excess assets of the plan — that is, the amount in excess of that which is necessary to provide participants with their accrued benefits — may lawfully revert* to the plan's sponsor upon complete termination so long as the distribution does not contravene any provision of law.

[22] In 1987 Senate leaders embraced these Guidelines stating: "it is believed that the present law standards, as reflected in the Implementation Guidelines, and the present-law excise tax on reversions, are appropriate rules for addressing the issue of employer access to excess plan assets." S. Prt. No. 100-63, 100th Cong., 1st Sess. 193 (1987).

Plan Asset Raid Hearing Before the Select Committee on Aging, House of Representatives, 98th Cong., 1st Sess., 99 (1983) ("Plan Asset Raid Hearing") (emphasis added). The IRS made equivalent statements at these hearings. *Id.* at 101. (Statement of S. Allen Winborne, Asst. Commissioner).

The court below disregarded all these agency views. This Court has repeatedly held that the federal courts are not free to substitute their judgments as to statutory construction for those of the responsible federal agencies, which command great deference.[23] Recognizing that "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views", *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 568 (1980), other courts of appeals have held that Category 6 does not create any substantive right for employees to receive unearned benefits upon plan termination.[24]

[23] *See, e.g., Lawrence County* v. *Lead-Deadwood School Dist.,* 469 U.S. 256, 262 (1985); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-45 (1984); *Nachman,* 446 U.S. at 373-74. Other courts of appeals have given great deference to the PBGC's interpretation of ERISA. *See, e.g., General Motors Corp.* v. *California Bd. of Equalization,* 815 F.2d 1305, 1310 (9th Cir. 1987), *cert. denied sub nom., General Motors Corp.* v. *Bennett,* ___ U.S. ___, 108 S. Ct. 1122 (1988); *Flying Tiger Line* v. *Teamsters Pension Trust Fund,* 830 F.2d 1241, 1248 n. 12 (3d Cir. 1987); *Robbins* v. *McNicholas Transp. Co.,* 819 F.2d 682, 686 (7th Cir. 1987); *Rettig* v. *PBGC,* 744 F.2d 133, 140-41 (D.C. Cir. 1984); *Concord Control, Inc.* v. *International Union, UAW,* 647 F.2d 701, 704 (6th Cir.), *cert. denied sub nom., Concord Instruments Corp.* v. *PBGC,* 454 U.S. 1054 (1981); *Connolly* v. *PBGC,* 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979).

[24] In *Ashenbaugh* the Third Circuit rejected Category 6 claims by former employees identical to those sustained by the court below, holding that "it

G. Important Policy Implications Compel Reversal of the Decision Below.

The agency interpretations outlined above serve important policy objectives. Defined benefit plans are a vital part of the private pension system — so vital that Congress imposed a statutory obligation on the PBGC "to encourage the continuation of [such] plans." ERISA § 4002(a)(1).

As Congress, many courts, and commentators have recognized, prohibiting reversions of surplus assets when such

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[is] clear that ERISA § 4044 . . . does not create a right in early retirement benefits, but only sets priorities to be applied in cases where plan funds are not sufficient." 854 F.2d at 1529. And, in *Blessitt* the Eleventh Circuit, sitting en banc, unanimously held that "ERISA does not require that employees receive a benefit which is calculated on the basis of anticipated future years of service which have not actually been worked as of the termination date." 848 F.2d at 1165. The Eleventh Circuit expressly rejected the interpretation of the legislative history of Category 6 adopted by the *Amato* and *Tilley* courts:

> [W]e conclude that it is not plausible that Congress intended to include benefits based on anticipated future years of service.
>
> . . . To adopt [that] position would mean that the conferees expanded the scope of the priority scheme far beyond that of either of the predecessor bills.
>
> . . . [T]here is *no* mention in the legislative history that ERISA expanded the concept of benefits to which an employee was entitled to include benefits he possibly would earn in the future.

848 F.2d at 1178-79 (emphasis in original). In reaching these conclusions, the Third and Eleventh Circuits both gave great deference to the views of the PBGC, the IRS, and the DOL, properly concluding that those views directly conflicted with the employees' claim that Category 6 entitled them to unearned benefits. *Ashenbaugh*, 854 F.2d, at 1529; *Blessitt*, 848 F.2d at 1167-68, 1172 n. 19.

These recent decisions about Category 6 are clearly correct. The decision below and *Amato* cannot co-exist with the results or the reasoning of *Blessitt* and *Ashenbaugh*. ERISA simply cannot be read to require an employer to pay any benefits from a pension plan to employees who have not yet earned them by satisfying plan requirements.

plans terminate would inevitably lead employers to select actuarial methods and assumptions that will result in slower plan funding in order to avoid creation of surplus assets. An insightful analysis of this problem was provided in the testimony of then-IRS Assistant Commissioner S. Allen Winborne:

> If we were only considering a terminated plan, precluding a reversion to the employer would seem desirable for the participants. However, many believe that the preclusion of such reversions would seriously reduce the funding of many defined benefit plans.
>
> . . . If reversions were precluded, an employer's actual costs would be increased because larger benefits than those otherwise promised would be provided following plan termination. Many employers would, therefore, choose to fund their plans with lower contributions . . . and such reduced funding for a particular plan may, over time, jeopardize that employer's ability to maintain the plan.

Plan Asset Raid Hearing, at 103. The courts have agreed.[25]

The effect of the rule adopted below would be not only to weaken the sound funding of defined benefit plans on a

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[25] "An employer that knew that it was prohibited from recapturing the surplus might be tempted to underfund its plan — a result that would benefit no one." *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1987). *Accord Blessitt*, 848 F.2d at 1176-77; *Wright* v. *Nimmons*, 641 F. Supp. 1391, 1407 (S.D. Tex. 1986) ("Common sense dictates that employers which fund plans under ERISA guidelines should not be penalized for overfunding in an abundance of caution or as a result of miscalculation by the actuary."); *Eagar* v. *Savannah Foods & Indus., Inc.*, 605 F. Supp. 415, 420 (N.D. Ala. 1984) (Over time, "pension plan participants in general stand to benefit more from a policy that encourages employers to fund pension plans generously than from a policy that entitles plan participants to surplus assets and thereby discourages employers from potentially excessive funding."); *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1273 (3d Cir. 1978).

systemic basis, but also to hasten the demise of those that exist and to deter the creation of new ones. As the amicus brief filed by the American Society of Pension Actuaries in this case points out,

> [s]ingle employer defined benefit plans have long operated on the assumption that the plan sponsor was entitled to assets upon termination in excess of those required to fund accrued benefits. This was a balanced arrangement, since the employer is responsible for additional funding to provide the benefits under the plan if poor investment or other experience cause the plan to be underfunded. *Tilley will not only cause the specific results we have already described — uncertainty as to how to process terminations, massive litigation with respect to terminations already completed, and lower funding levels but will create significant doubts in the minds of employers as to whether they wish to be sponsors of single employer defined benefit plans because of the fact that fundamental and long understood ground rules are subject to sudden reversal.*

Amicus Brief of American Society of Pension Actuaries Supporting Mead's Petition, at 5-6. It is perhaps the cruelest irony of the decision below that it will drive employers toward the conclusion that defined contribution plans — where no defined benefit is assured and the employees bear the risk of poor plan performance — are preferable vehicles for providing pension benefits.

Although Congress could mandate the result reached below, it has so far rejected all entreaties that it do so. In these circumstances, courts must tread cautiously. In an area replete with complex federal legislation, courts should not make drastic changes in the legal rules governing pension funds. This is particularly true where thousands of employers have acted in reliance on such legislative rules. *See Alessi*, 451 U.S. at 521. The court below unwittingly adopted precisely the opposite approach, and in so doing did great damage to the private pension system that protects millions of working Americans.

II. PARTIAL SATISFACTION OF THE REQUIREMENTS FOR RECEIVING SUBSIDIZED EARLY RETIREMENT BENEFITS CREATES NEITHER ACCRUED BENEFITS NOR CONTINGENT LIABILITIES.

Under Mead's Plan a subsidized early retirement benefit was payable to each employee who retired after both completing 30 years of service and attaining age 62 while in the service of Mead. Each of the Employees was separated from service with Mead without having satisfied both the age and service requirements for an early retirement subsidy. *See supra* at 4.

In addition to relying upon *Amato's* reading of Category 6 (discussed above), the Employees argued below that a portion of their subsidized early retirement benefits were "accrued benefits" that had to be paid upon plan termination, and that these benefits were "contingent liabilities" of the Plan that had to be satisfied before any surplus assets could revert to Mead. Both contentions are wrong.

A. No Portion of The Employees' Early Retirement Benefits are Accrued Benefits.

It is rarely easy to explain or understand a law like ERISA that is both a "comprehensive and reticulated statute[.]" *Nachman*, 446 U.S. at 361. In the current context, it is easier to say what "accrued benefits" are not than to say what they are. As the following text makes clear, the early retirement subsidies at issue in this case are not part of "accrued benefits" and are not earned ratably over time. The more technically intricate task of explaining what "accrued benefits" are, which in the end is equally clear, has been relegated to the margin.[28]

[28] The Code does not define "accrued benefit" in an entirely straightforward way. Under Code § 411(a)(7)(A)(i), the accrued benefit under a defined benefit plan like Mead's is "the employee's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." Under Code § 411(a)(8) "normal retirement

Under the Code, ERISA, and the Plan, a pension benefit which has accrued must be fully vested upon plan termination and must be paid before surplus assets can revert to Mead. *See supra* at 12. An employee's accrued benefit at any point in time is the amount of normal retirement benefit that the employee has earned by reason of age and service to that date. ERISA § 3(23)(A), Code § 411(a)(7). Early retirement subsidies are not taken into account in determining an employee's accrued benefit under ERISA. Code § 411(c)(3), enacted by ERISA, states that: "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such [normal retirement age] benefit . . . ." The regulations explaining Code § 411(c)(3) provide that "a subsidized early retirement benefit which is provided by a plan is not taken into account, except to the extent of determining the normal retirement benefit under the plan . . . ." Treas. Reg. § 1.411(a)-7(a)(1)(ii). The regulations provide an example illustrating the point:

> Plan A provides for a benefit equal to 1% of high five years compensation for each year of service and a normal

age" is generally the earlier of age 65 or the normal retirement age specified in the plan. Code § 411(a)(9) provides that the "normal retirement benefit" is the greater of the benefit under the plan that commences at normal retirement age or the early retirement benefit under the plan.

Under Code § 411(c)(3), which is discussed in the text and cross-referenced in the Code § 411(a)(7)(A)(i) definition of accrued benefit, if an employee's benefit is paid other than as an annual pension beginning at normal retirement age, the form of benefit paid must be the actuarial equivalent of the normal retirement benefit commencing at normal retirement age, but any subsidized early retirement benefit is disregarded in determining an actuarial equivalent of the accrued benefit. Thus, the "normal retirement benefit" under the plan is whichever of the early retirement benefit or the benefit payable at normal retirement age involves the larger periodic dollar payments, without regard to which stream of payments represents the largest actuarial value. And, when converting the "normal retirement benefit" to an actuarial equivalent under Code § 411(c)(3), early retirement subsidies are disregarded.

> retirement age of 65. The plan also provides for a full unreduced accrued benefit without any actuarial reduction for any employee at age 55 with 30 years of service. Even though the actuarial value of the early retirement benefit could exceed the value of the benefit at the normal retirement age, ***the normal retirement benefit would not include the greater value of the early retirement benefit because actuarial subsidies are ignored.***

Treas. Reg. § 1.411(a)-7(c)(6) Ex. (1) (emphasis added).[27]

These regulations reflect the clear intention of Congress, which decided to exclude early retirement subsidies from an employee's accrued benefit, apparently because it did not want to deter employers from providing such subsidies.[28]

[27] Treasury Regulations issued in 1988 confirm the IRS's views that an early retirement subsidy is no part of the participant's accrued benefit. *See* Treas. Reg. § 1.411(a)-7(d)(4)(iv)(B), requiring that lump sum distributions of an employee's accrued benefit be equal only to the present value of a life annuity beginning at normal retirement age, exclusive of any subsidies the plan may provide, and Treas. Reg. § 1.411(d)-4:Q&A2(a)(2), providing that a plan may permit a participant to elect in full satisfaction of his plan benefit, a lump sum payment of his accrued normal retirement benefit which does not include the value of a retirement subsidy he has earned or may earn. *See also* Treas. Reg. § 1.411(a)-11(a)(2). In *de Nobel* v. *Vitro Corp.*, No. JH-86-698 (D. Md. May 6, 1988) (appeal pending), the court held that a plan may provide a fully subsidized early retirement benefit in the form of an annuity and provide a lump sum option commencing at early retirement age that does not include the value of the subsidy, so long as the lump sum is at least the actuarial equivalent of the normal retirment benefit. Slip op. at 13-14.

[28] According to the House Committee on Education and Labor,

> [T]he accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age . . . . The committee believes it is desirable not to discourage early retirement plans, accordingly the accrued benefit computation shall be made, for the purposes of the bill, only with regard to the benefit payable at the normal or regular retirement age. The value of any benefit payable under a plan prior to that age may be disregarded.

Despite the natural sympathy that must be felt for any employee who falls just short of qualifying for an early retirement subsidy — a sentiment that obviously moved the court below — the ERISA Congress was categorical that no portion of a subsidized early retirement benefit is payable to such an employee. An explicit example in ERISA's legislative history that bears a striking resemblance to the present case makes this clear.[29] Thus, even if an employee is 29/30ths of the way towards earning a subsidized early retirement benefit, that employee has earned no portion of it.

B. The Employees' Claims Are Not Protected By the Anticutback Rule of Code § 411(d)(6).

Under the so-called "anticutback" rule of Code § 411(d)(6) as enacted by ERISA, accrued benefits may not be reduced or eliminated by plan amendment.[30] Although the anticutback

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Report of the House Committee on Education and Labor proposing an amendment to H.R. 2 in the form of a substitute bill, H.R. 12906, which contained a provision identical to Code § 411(c)(3) as ultimately enacted by ERISA. II Leg. Hist. at 3328-29. *See also* H.R. Rep. No. 93-807, 93d Cong., 2d Sess. at 61 (1974); II Leg. Hist. at 3181.

[29] The House Committee on Education and Labor stated:

> In the case of plans which provide for early retirement . . . the employee who meets the conditions for early retirment may receive a much greater benefit in terms of value than the employee who fails to meet the early retirement conditions. For example, if [in] a plan which had a normal retirement age of 65, and an early retirement age of 55, with 30 years of service, and an annual benefit accrual of one percent of compensation, subject to a 30 percent of compensation ceiling, an employee who began work at 25, and retired at 55, would receive a benefit of 30 percent of compensation each year thereafter; but, if the employee left his job at age 54, he would receive a benefit of 29 percent a year which was not payable until age 65.

II Leg. Hist. at 3329.

[30] This rule is consistent with the general pattern of ERISA under which only accrued benefits are protected. Thus, only employees' accrued benefits must become nonforfeitable in accordance with the vesting schedules in

rule extends only to the accrued benefit, a post-ERISA Treasury Regulation dealing with actuarial equivalents in the context of the anticutback rule suggests that early retirement benefits may be protected as accrued benefits.[31]

This regulation was adopted at the same time as Treasury Regulation § 1.411(a)-7(a)(1) (*See* T.D. 7501, 1977-2 C.B. 133) which expressly provides that early retirement subsidies are not part of the accrued benefit and are to be ignored. Since there was no statutory basis in ERISA for treating early retirement subsidies as part of the accrued benefit, it was widely assumed in the pension community that the only way to reconcile Treasury Regulations §§ 1.411(a)-7(a)(1) and 1.411(d)-3(b) was by reading the latter as prohibiting only changes in actuarial factors that reduce an early retirement benefit below the actuarial equivalent of the normal retirement benefit. As the Third Circuit said in *Bencivenga* v. *Western Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 580 (3d Cir. 1985), "any other interpretation would subject [Treasury Regulation § 1.411(d)-3(b)] to nullification as being promulgated in conflict with the underlying statutory scheme."

Code § 411(a)(2). If an employee reaches the normal retirement age under the plan, that employee's accrued benefit must become 100 percent nonforfeitable. Code § 411(a). If a plan is terminated before an employee reaches normal retirement, the employee's accrued benefit must become 100 percent nonforfeitable, to the extent funded. Code § 411(d)(3).

[31] Treasury Regulation § 1.411(d)-3(b) states:

> For purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates shall be treated as one plan amendment. Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, and to *actuarial factors for determining optional or early retirement benefits.* (emphasis added).

In Revenue Ruling 81-12, 1981-1 C.B. 228, however, the IRS took the position, without explanation or analysis, that a plan amendment changing the actuarial factors for determining early retirement benefits that reduces those benefits in any way violates Code § 411(d)(6)'s prohibition on cutbacks in the accrued benefit.[32] Most courts that have considered the issue have disagreed, ruling instead that an early retirement benefit is not part of an employee's accrued benefit. In *Bencivenga*, 763 F.2d at 580, the court expressly disagreed with Revenue Ruling 81-12. It construed Treasury Regulation § 1.411(d)-3(b) as prohibiting only changes in actuarial factors that reduce an early retirement benefit below the actuarial equivalent value for the normal retirement benefit, and confirmed that early retirement benefits form no part of the accrued benefit.[33] In *Amato*, although the Second Circuit noted that there could be doubts about Revenue Ruling 81-12, it upheld that Ruling's interpretation as not unreasonable or plainly inconsistent with the Code. 773 F.2d at 1412. In recently promulgated regulations, the IRS has reaffirmed that an early retirement subsidy forms no part of the accrued benefit and therefore does not have to be included in actuarially equivalent optional forms of benefit. *See* note 27 *supra*. Thus, the IRS appears to have receded from the position it took in Revenue Ruling 81-12 and as an amicus curiae in *Amato*. Interestingly, that amicus brief, authorized by the Solicitor General, claimed no statutory basis for the position taken in Revenue Ruling 81-12, admitted that the legislative history tended to undercut rather than support it, and merely asked that the court defer to the IRS's determination in that case. Amicus Curiae Brief for the United States, at 7, 9, *Amato*, (2d Cir. filed Mar. 5, 1985) (No. 84-7978).

[32] *See also* Rev. Rul. 79-90, 1979-1 C.B. 155, stating that in order to satisfy the requirement that employer contributions to a defined benefit plan be determined actuarially on the basis of definitely determinable benefits (*see* Treas. Reg. § 1.401-1(b)(1)(i)) the assumptions used for determining actuarial equivalents must be specified in the plan. This ruling was generally given only prospective effect and was treated by the Seventh Circuit as not stating any legal requirement imposed by ERISA. *Dooley* v. *American Airlines, Inc.*, 797 F.2d 1447, 1452-53 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987).

[33] *Accord Ashenbaugh*, 854 F.2d at 1526; *Sutton* v. *Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Hagan* v. *Kaiser Aluminum & Chem. Corp.*, 668 F. Supp. 1298, 1302 (E.D. Mo. 1987); *Serb* v. *Gagnier Products Co. Defined Benefit Pension Plan & Trust*, 658 F. Supp. 6, 8 (E.D. Mich. 1986); *United Elec., Radio & Mach. Workers* v. *Amcast Indus. Corp.*, 634 F. Supp. 1135, 1142 (S.D. Ohio 1986); *Folke* v. *Schaffer*, 616 F. Supp. 1322, 1327-28 (D. Del. 1985); *Petrella* v. *NL Indus., Inc.*, 529 F. Supp. 1357, 1364-66 (D.N.J. 1982). *But see Amato*, 773 F.2d at 1412.

C. The Retirement Equity Act Did Not Convert Early Retirement Subsidies Into Accrued Benefits.

In REA Congress extended the Code § 411(d)(6) "anticutback" rule so that any plan amendment that has the effect of "eliminating or reducing an early retirement benefit or a retirement-type subsidy . . . shall be treated as reducing accrued benefits." REA did not amend Code § 411(c)(3), which continues to exclude early retirement subsidies in calculating any actuarial equivalent of the accrued benefit. Even if REA's protection had been in effect when the Plan was terminated, the Employees would not have gotten more benefits than they have already received,[34] and the enactment of REA

[34] It is therefore unnecessary in this case to decide whether REA was codifying law or creating it. In commenting on the version of REA amendments to Code § 411(d)(6) that was not ultimately adopted, and that, in any event, did not extend to plan terminations, (*see* note 35 *infra*), the report of the Committee on Ways and Means, referring to Rev. Rul. 79-90 and Rev. Rul. 81-12, said that "the committee believes that these rulings should be codified" and "the bill codifies present law generally. . . ." H.R. Rep. No. 98-655, Pt. 2, 98th Cong., 2d Sess., at 25 (1984). In explaining the Code § 411(d)(6) amendments that were adopted, however, the Report of the Senate Committee on Finance says that "no inference is to be made . . . as to the scope of the [Code § 411(d)(6)] prohibition before the effective date of the provision." S. Rep. No. 98-575, 98th Cong., 2d Sess., at 28 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 2547, 2574. The amendments expanding Code § 411(d)(6) were in fact made effective only for plan amendments made after July 30, 1984.

is perhaps the most convincing proof that the decision below is wrong.

As amended by REA, Code § 411(d)(6)(B) now extends to plan amendments or terminations[35] that would reduce or eliminate, *inter alia*, retirement-type subsidies. Rather than converting such benefits into accrued benefits, REA § 301(a)(1) merely provides that an amendment reducing or eliminating them shall be "treated as one reducing accrued benefits" — *i.e.*, as a reduction or elimination prohibited under the general rule of Code § 411(d)(6)(A).

Even after REA there is no prohibition on plan amendments that reduce or eliminate future plan benefits. As has always been the case, a plan may be amended to reduce or eliminate benefits that will accrue because of future service without violating Code § 411(d)(6). If such an amendment occurs in the context of plan termination, Code § 411(d)(3) requires that any accrued benefits earned up to the time of plan termination must become nonforfeitable, to the extent funded. No such vesting requirement applies to early retirement subsidies. S. Rep. No. 98-575, at 28, 2574. Although they cannot be eliminated under REA, they need be paid at plan termination only to those who have already met all of the age and service requirements to earn them. Fully earned early retirement subsidies become plan liabilities that must be paid when a plan is terminated and before any surplus assets may revert to the employer. *See* Code §§ 401(a)(2), 411(d)(3).

Even with ERISA, "[n]ot infrequently, the best guide to what a statute *means* is what it *says*." *Stewart* v. *National Shopmen Pension Fund*, 730 F.2d 1552, 1560-61 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984) (emphasis in original). Under the express terms of the second sentence of Code

[35] Although the earlier House version excluded plan terminations from the new rule, H.R. 4280, 98th Cong., 2d Sess. (1984), that provision was deleted from the final version of REA, and the Senate Committee Report makes it clear that such benefits are protected by REA in case of plan termination. S. Rep. No. 98-575 at 31, 2577.

§ 411(a)(6)(B), as added by REA, the new protections against amendments or terminations reducing or eliminating early retirement benefits apply "only with respect to an employee who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy."[36] When the plan conditions are later satisfied, if ever, the employee's benefit is calculated only by reference to his service up to the time of the plan amendment or termination.[37] If the employee's service with the employer ends before the employee meets all the criteria for the subsidized benefit, the employee is entitled to none of it.[38]

It is thus clear both before and after REA that early retirement subsidies are not part of an employee's accrued benefit. Indeed, after REA, just like before, an employee is not entitled to receive even a proportionate part of an early retirement subsidy if the employee has not met all of the age and service requirements. An early retirement subsidy is earned all at once, when all the conditions under the plan are met, or not at all. To put the point a different way, REA only gives each employee the opportunity to earn subsidized early retirement benefits if, at a later date after plan termination, the

[36] Although literally applicable only to retirement-type subsidies like the one in this case, the legislative history indicates that this provision applies to early retirement benefits and optional forms of benefit as well. S. Rep. No. 98-575 at 28, 2574.

[37] S. Rep. No. 98-575, at 28, 2574. For example, if an early retirement subsidy is payable after 30 years of service and age 62 and the subsidy is eliminated when an employee has 20 years of service, the employee will be eligible to receive the subsidy after completion of 30 years of service and attainment of age 62, but the dollar amount of the benefit will be calculated under the plan's formula with reference only to his 20 years of service. If the employee's salary did not increase, the employee would, in effect, get 2/3 of a full subsidized benefit, but only after reaching age 62 with 30 years of service.

[38] *Id.* at 29, 2575. This is true under the great majority of plans, which, like the Mead Plan, require that *both* the age and service requirements be satisfied while the participant is in the service of the employer. J.A. 39.

employee fulfills the particular age and service criteria set forth in the plan. In the instant case the Employees would not have been entitled to relief even if REA had applied to the Plan termination. Retirement from Mead after age 62 was impossible for these Employees because their employment was severed when Mead sold the Foundry.[39]

The Employees argued below that REA makes this case a "dinosaur."[40] To the contrary, if ERISA requires that the Employees' be paid a portion of their unearned early retirement subsidies, REA's protection of those subsidies would have been unnecessary. Because REA requires the payment of such benefits only if and when all requirements for earning them have been met, REA stands as the best evidence that the Employees' claims in this case must be rejected. The REA Congress undoubtedly did not intend to pass a statute that was a pointless deadletter from the instant of enactment.

D. Awarding Proportionate Early Retirement Benefits Is Tantamount To Awarding Benefit Expectations Rather Than Benefits That Have Accrued.

Since early retirement benefits do not accrue ratably, in order to rule that proportionate early retirement benefits based on service to the date of plan termination must be paid when a plan is terminated, a court must assume that the required future years of service will occur. Thus, the decision of the court below and of the court in *Amato*, like the panel decision in *Blessitt* that was unanimously reversed after en

[39] S. Rep. No. 98-575, at 28, 31; 2574, 2577. The Finance Committee Report makes it clear that, when employment is severed before an employee meets the plan's requirements for an unreduced early retirement benefit, the employee is not entitled to the benefit. *Id.* at 29, 2575. *See also* Treas. Reg. § 1.411(d)-4:Q&A2(a)(2)(iv) (Ex. 1, employee X).

[40] Answer of [Employees] to [Mead's] Petition for Rehearing and Suggestion for Rehearing In Banc, p. 4.

banc reconsideration, were all necessarily based on the employees' expected future years of service.

In both *Amato* and the instant case where the "benefit expectations" being protected were early retirement subsidies, the fundamental error in the courts' reasoning was the misconception that early retirement subsidies are accrued benefits that increase ratably over the period of plan participation. They are not and they do not. This Court should say so unambiguously in order to dispel the confusion that has grown up around the concept of accrued benefits, stem the flood of litigation caused by *Amato*, *Tilley*, and the *Blessitt* panel decision, and put permanently to rest the heretical notion that "benefit expectations" need to be paid when a plan terminates with surplus assets.

E. The Employees' Benefits Are Not Contingent Liabilities Of The Plan Payable Upon Plan Termination.

The Employees also argued below that the unearned early retirement benefits they seek are "contingent liabilities" that must be satisfied before Mead could obtain a reversion. While the Plan benefits were indeed "contingent" in the sense that they were not earned until an employee fulfilled the requirements for them, they are not "contingent liabilities" that ERISA requires to be paid upon plan termination.

The Code and ERISA prevent a reversion of surplus assets until all plan "liabilities" are paid. Code § 401(a)(2); ERISA § 4044(d)(1). The IRS definition of liabilities owing upon plan termination was established in 1953 in Revenue Ruling 53-33, 1953-1 C.B. 267:

> In determining whether any surplus exists on termination of a trust, . . . all liabilities, contingent as well as fixed, with respect to employees . . . under the trust must be taken into account. Fixed liabilities are the benefits payable to those who have become entitled to

> them. Contingent liabilities are the benefit credits *accrued up to the time of termination* of the trust for employees . . . who might have become entitled to benefits if the trust had been continued indefinitely.

(Emphasis added.)[41] Nowhere do Treasury Regulations or IRS Rulings suggest that benefits in excess of those earned under the plan at the time of plan termination are payable before excess assets may revert.

To reflect REA's extension of the anticutback rule of Code § 411(d)(6) to protect early retirement subsidies, in 1985 the IRS expanded its definition of plan "liabilities" to be paid on termination to include for the first time contingent obligations for possible future subsidized benefits. Rev. Rul. 85-6, 1985-1 C.B. 133. The ruling provides that a plan may satisfy REA's new liabilities by purchasing annuities for employees that contain provisions that pay the subsidy only if the employee earns it in the future by completing the age and service requirements.

In recently released final regulations that govern employee rights under REA, the IRS again confirmed that early retirement benefits that have not been earned are not protected. Treas. Reg. § 1.411(d)-4:Q&A1. In a specific example the regulations state that, even after REA, an employee who terminates employment and elects to receive the value of the employee's accrued normal retirement benefit in a single sum upon plan termination is not entitled to receive any part of the early retirement benefit, since the employee had not met the early retirement criteria under the plan. *Id.* at Q&A2(a)(2)(iv)(Ex. 1, employee X).

Finally, it bears repeating that both the IRS and the PBGC reviewed the proposed termination of the Mead Plan and

[41] Similar or identical words appear in subsequent regulations and rulings. *See* Treas. Reg. § 1.401-2(b)(2); Rev. Rul. 71-152, 1971-1 C.B. 126; Rev. Rul. 83-52, 1983-1 C.B. 87; Rev. Rul. 85-6, 1985-1 C.B. 133.

ruled favorably on it. The favorable IRS determination is particularly relevant in the present context.[42] ERISA itself provides only that the "liabilities" of a pension plan must be satisfied before any surplus assets can revert to the employer. It was the IRS that defined this term to include both "contingent" and "fixed" liabilities, and it was the IRS that defined "contingent liabilities" very narrowly in its regulations and rulings. If the IRS believed that unearned early retirement subsidies were "contingent liabilities" that had to be paid out on plan termination, it would not have promulgated post-REA rulings (Rev. Rul. 85-6) and regulations (Treas. Reg. § 1.411(d)-4:Q&A2(a)(2)(iv) (Ex. 1, employee X)) that do not require their payment. Nor would the IRS have specifically ruled that the termination of the Mead Plan without any provision for payment of unearned early retirement subsidies satisfied all applicable qualification provisions of the Code. The Employees cannot find support in an IRS regulation that the agency itself found fully satisfied in this case.

[42] The IRS has stated clearly what is involved when it rules on a plan termination.

> A favorable determination letter will be issued to a terminated defined benefit plan after the service is satisfied that, among other items, one, the terms of the plan and trust meet the code's qualification requirements; two, the assets of the plan have not been used for, or diverted to, purposes other than the exclusive benefit of the employees and their beneficiaries *prior to the satisfaction of all plan liabilities;* three, the plan had no operational defects, such as prohibited discrimination that would cause it to meet or fail to meet the qualification requirements; and four, the plan has been a permanent and continuing program of the employer; five, the rights of all affected employees to benefits accrued to the date of the termination, to the extent funded are fully vested; and six, *only the assets in excess of those required to satisfy all liabilities with respect to employees and their beneficaries may revert to the employer.*

Plan Asset Raid Hearing, at 101 (testimony of S. Allen Winborne, Asst. Commissioner) (emphasis added).

III. BECAUSE THE PLAN'S SURPLUS ASSETS RESULTED FROM "ACTUARIAL ERROR," THE REVERSION TO MEAD WAS PROPER.

Treasury Regulations define the surplus assets that may revert as those resulting from "erroneous actuarial computations." Treas. Reg. § 1.401-2(b)(1). The Mead Plan incorporates this definition. J.A. 63. The Employees argued below that the reversion paid to Mead was not caused by actuarial error. Nothing in the applicable regulations suggests that the excess here did not arise from actuarial error, however, and Revenue Ruling 83-52 states "when fixed and contingent liabilities are discharged . . . the remaining assets may be considered surplus arising from actuarial error."

It undoubtedly seems odd that there can be surplus assets due to "actuarial error" when no actuary erred. This whole subject has been ably and amply explained by the IRS itself, however, in testimony to Congress about Revenue Ruling 83-52:

> Even though upon plan termination there are excess assets which are considered to result from erroneous actuarial computations, that does not mean that mistakes in the usual sense were made by actuaries. In estimating the actual future benefits that will be provided under a plan, the actuary makes many assumptions as to future investment earnings, mortality, employee turnover, salaries, and so forth, generally on the basis that the plan will not terminate.
>
> As I have described earlier, at a particular point in time under some level funding methods, the plan assets will exceed the value of accrued benefits. In addition, actuarial assumptions are almost never exactly or precisely realized, and in many cases actual experience may have been more favorable than assumed, such as investment performance exceeding that which was assumed. In such cases, actual plan assets may exceed expected plan assets. If such plans terminate with excess assets, the erroneous actuarial computation results primarily because the termination of the plan was not assumed when the computations were made.

Plan Asset Raid Hearing, at 104.

In short, no identifiable error by an actuary needs to be proved before surplus may revert to the employer. Any actual surplus remaining after satisfaction of liabilities under a terminating defined benefit plan that has been properly operated and funded will satisfy the IRS standards for being surplus attributable to "actuarial error." The courts that have considered the issue, including the district court below, agree.[43] The IRS applied its long-standing definition of "actuarial error" to the plan termination at issue and determined that it was proper. The Employees cannot be heard to complain that a technical concept, defined and consistently applied by the IRS, does not conform to their layman's understanding of that concept.

IV. THE COURT BELOW ABUSED ITS DISCRETION IN REACHING AND DECIDING THE DAMAGE ISSUE WHEN THAT ISSUE WAS NOT ADDRESSED BY THE DISTRICT COURT, AND WAS NOT RAISED, BRIEFED, OR ARGUED ON APPEAL.

The court below surprised Mead by holding, for the first time on appeal, that the Employees were entitled to have their subsidized early retirement benefits included in the calculation of the amount of their lump sum payment and

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[43] *Tilley* v. *Mead Corp.*, No. 84-0751 (W.D. Va. Apr. 18, 1986) (Pet. App. 13a); *International Union, UAW* v. *Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984). *See also Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 555 F. Supp. 257, 260 (D.D.C. 1983), *aff'd mem.*, 729 F.2d 863 (D.C. Cir. 1984); *Pollock* v. *Castrovinci*, 476 F. Supp. 606, 616 (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 575 (2d Cir. 1980); *In re C. D. Moyer*, 441 F. Supp. at 1132-33.

that the correct calculation of the early retirement benefits "should be determined by figuring the actuarial reduction of five percent per year from the early retirement age of the [employee], rather than from age sixty-five." 815 F.2d at 992 (Pet. App. 7a). Reaching and deciding an issue not passed on by the district court was an abuse of discretion.

The parties did not fully brief the issue of damages in the district court, and the evidence on damages before that court was scant. The parties did not submit affidavits on damages with their respective summary judgment motions and opposition memoranda (R. 24-25, 28, 30-31, 34, 36), nor did they offer testimony or other evidence at the hearing. R. Vol. III (Hearing Transcript).

The Employees' motion contained a chart purporting to show the correct method of calculating the amounts owed to each of the six Employees. R. 25, p. 10. This chart, however, had little, if any evidentiary value, and was tantamount to mere argument by their counsel. According to the chart the five percent per year actuarial reduction factor contained in the Plan for calculating *normal* retirement benefits when an employee retires before age 65 (J.A. 38, R. 19, pp. 11-13) was to be applied as the actuarial reduction in calculating their *early* retirement benefit from age 62 (age 64 for Mr. Crotts) to the date their employment was severed. R. 25, p. 10, n. 6. Because the Plan itself did not provide for a subsidized early retirement benefit before the date upon which an employee satisfied *both* the age 62 and 30 years' service requirements, it obviously provided no formula for actuarial reduction of such a benefit. R. 19, p. 13.[44] The district court held that Mead was not liable; thus, it did not address the issue of damages in its Memorandum Opinion. Pet. App. 10a-15a.

[44] In their motion the Employees also mentioned Exhibits A-D as being attached, but in fact those Exhibits were not attached, were not filed with the district court, and were never served on Mead. R. 25. Mead's motion sought only a determination in its favor on liability, did not brief or submit evidence on damages, and suggested that the district court need not reach the damage issue if Mead's motion was granted, R. 31, p. 2, n. 1.

The Employees did not raise damages as an issue on appeal to the Fourth Circuit. A. 7-10. Their counsel did, however, append a chart to their initial brief below as "Exhibit 1" showing the amounts of damages they claimed and their theory of how to calculate those amounts. A. 11.[45] The Employees' brief was accepted for filing in the court below out of time (J.A. 3, Nos. 1, 4), apparently because they were required to obtain leave of Court to attach the chart as an exhibit. The Employees filed such a motion, Mead opposed it, and the Employees filed a reply memorandum stating that:

> [We] agree with [Mead] that the District Court never reached the issue of damages[;] . . . the lower court record is not sufficient to pursue a damage claim on the appellate level[,] . . . and damages are not even the issue in this appeal.

A. 12-13. In its order granting the Employees' motion, the court below ruled that the exhibit was "nothing more than mere argument" and was "of no value unless supported by the record . . . ." A. 14. In its opinion on the merits, however, the court did an about-face, adopting the Employees' theory of computation as contained in the chart and ordering that it be used on remand to determine the amounts due.

Federal appellate courts generally do not consider for the first time on appeal issues not passed upon below. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). Parties should have the opportunity to submit all the evidence they consider relevant to all issues, and an appellate court should not surprise them by rendering a final decision on issues upon which they have not had an opportunity to introduce evidence. *Id.* (citing *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941)).

This Court also ruled in *Singleton*, however, that the courts of appeals have limited discretion to resolve issues not passed

[45] This exhibit was essentially the same as the chart contained in the Employees' Motion for Partial Summary Judgment. R. 25, p. 10, Fig. 4.

on below. 428 U.S. at 121. While declining to announce a general rule, this Court described two exceptional situations where such a procedure would be justified: "where the proper resolution is beyond any doubt, . . . or where 'injustice might otherwise result.' " *Id.* (citations omitted). In deciding that the court of appeals had erred in *Singleton*, this Court pointed out that the court of appeals reached an issue of first impression and stated that "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." *Id.*

The exceptions do not apply to this case any more than they did in *Singleton*. How to compute an unearned early retirement benefit not provided for in the Plan, actuarially reduced and adjusted for lump-sum payment, is a complex issue of first impression and is far from being "beyond any doubt." It was fundamentally unfair, and an injustice was caused, not avoided, when the court below decided the issue of damages on appeal without Mead's ever having had an opportunity to be heard and present expert actuarial evidence.

This abuse of discretion should not go without remedy. Accordingly, if this Court were to affirm the court below as to liability, the Fourth Circuit's ruling on damages should be reversed and remanded for a full evidentiary hearing.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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INDEX TO APPENDIX

APPENDIX

ERISA Section 4044 (1974). Allocation of Assets

(a) In the case of the termination of a defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity —

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth —

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022(b)(5)), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(6) did not apply.

For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * *

(d)(1) Any residual assets of a plan may be distributed to the employer if —

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) The distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2) Notwithstanding the provisions of paragraph (1), if any assets of the plan attributable to employee contributions, remain after all liabilities of the plan to participants and their beneficiaries have been satisfied, such assets shall be equitably distributed to the employees who made such contributions (or their beneficiaries) in accordance with their rate of contributions.

* * *

26 U.S.C. § 401(a)(2)

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

* * *

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination);

26 U.S.C. § 411

§ 411. Minimum vesting standards

(a) General rule.—A trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age (as defined in paragraph (8)) and in addition satisfies the requirements of paragraphs (1), (2) and (11) of this subsection and the requirements of subsection (b)(3), and also satisfies, in the case of a defined benefit plan, the requirements of subsection (b)(1) and, in the case of a defined contribution plan, the requiremts of subsection (b)(2).

* * *

(7) **Accrued benefit.**—

(A) **In general.**—For purposes of this section, the term "accrued benefit" means—

(i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3), expressed in the form of an annual benefit commencing at normal retirement age, or

(ii) in the case of a plan which is not a defined benefit plan, the balance of the employee's account.

* * *

(8) **Normal retirement age.**—For purposes of this section, the term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the latest of—

(i) the time a plan participant attains age 65,

(ii) in the case of a plan participant who commences participation in the plan within 5 years before attaining normal retirement age under the plan, the 5th anniversary of the time the plan participant commences participation in the plan, or

(iii) in the case of a plan participant not described in clause (ii), the 10th anniversary of the time the plan participant commences participation in the plan.

(9) **Normal retirement benefit.**—For purposes of this section, the term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant

if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefits commencing before benefits payable under title II of the Social Security Act become payable which—

(i) do not exceed such social security benefits, and

(ii) terminate when such social security benefits commence.

* * *

§ 411(c) Allocation of accrued benefits between employer and employee contributions.—

* * *

(3) **Actuarial adjustment.**—For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

* * *

§ 411(d) Special rules.—

* * *

(3) **Termination or partial termination; discontinuance of contributions.**—Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that—

(A) upon its termination or partial termination, or

(B) in the case of a plan to which section 412 does not apply, upon complete discontinuance of contributions under the plan,

the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary to preclude the discrimination prohibited by section 401(a)(4), may not be used for designated employees in the event of early termination of the plan.

* * *

(6) Accrued benefit not to be decreased by amendment.—

(A) In general.—A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments.—For purposes of subparagraph (A), a plan amendment which has the effect of—

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

86-3858

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

B. E. TILLEY, et als.

v.

THE MEAD CORPORATION

APPELLANTS BRIEF

CLIFF HARRISON, ESQ.
SPIERS, STONE & HAMRICK
P.O. Box 2968
Radford, VA 24143
Attorney for Appellants

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• • •

[PAGE 39 OF APPELLANTS BRIEF]

EXHIBIT 1

Employees' Damages for Improper Actuarial Reduction

Employee	Age	Credited Service	Early Retirement Age[1]	Benefit Paid[2]	Early[3] Retirement Age Benefit	Difference[4]
B. E. Tilley	57.500	35.0833	62.0000	$87,108.74	$100,175.05	$13,066.31
D. H. Wall	57.0833	32.4167	62.0000	65,360.80	75,164.92	9,804.12
W. L. Crotts	61.4167	27.0833	64.3333	87,552.03	90,467.51	2,915.48
C. H. Reed	58.3333	30.8333	62.0000	69,882.45	80,364.81	10,482.37
J. C. Weddle	57.4167	36.0833	62.0000	50,800.35	58,420.40	7,620.05
W. D. Goode	59.0833	30.4167	62.0000	83,923.93	96,512.52	12,588.59
TOTAL DAMAGES						$56,476.92

[1] The early retirement age is the earliest age at which the employee could have retired with full benefits.

[2] See Interrogatory No. 4, Appendix at 28.

[3] The early retirement age benefit is determined by figuring the actuarial reduction of 5% per year from the Early Retirement age instead of the age of 65. In most cases this would be obtained by multiplying the benefit paid by the number 1.15. To calculate Mr. Crott's Early Retirement age benefit one would use only 0.6667 of a year (65 − 64.333 = 0.6667) and hence the number 1.0333 should be used.

[4] The difference is the difference between the Benefit Paid and the Early Retirement Age Benefit.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO 86-3858

B. E. TILLEY, et al.,
Plaintiffs/Appellants

vs.

THE MEAD CORPORATION,
Defendants/Appellee

REPLY MEMORANDUM OF APPELLANTS IN SUPPORT OF APPELLANTS' MOTION TO INCLUDE EXHIBIT AS PART OF OPENING BRIEF

The opposition of the Appellees to this Motion takes the Appellants somewhat by surprise as they had earlier agreed to such by telephone. The reasons which the Appellees state as their opposition came even more as a shock.

The Appellants' main concern is that the Exhibit is an attempt to change our damage theory on appeal. Actually, the Exhibit was literally a page torn off from the middle of Appellant's original brief in support of Summary Judgment. Time constraints and laziness of counsel prevented a brand new Exhibit. This former brief is not in the Appendix, but is in the record.

The information is placed in tabular form for convenience as it contains information best contained in a table. It is as an Exhibit, as such a table gives the word processor problems to place it in the middle of the brief.

Appellees' concern over damages is unfounded. Appellants agree with Appellees that the District Court never reached the issue of damages and Appellants do wish to let the Court have some demonstrative evidence as to what damages may look like so that they may better visualize the claim, but the

lower court record is not sufficient to pursue a damage claim on the appellate level.

Therefore, all of Appellees' objections are unfounded. The table appears in the record (although the footnotes have been slightly altered), the damages claimed are the very same damages as claimed at trial and damages are not even the issue in this appeal. What most of all surprises the Appellants is that the Appellees had the brief, with its Exhibit attached, at the time that the request for agreement was made to them on the telephone. The motion was only made after Appellants were informed by the court that the table should have been placed in the body of the brief in the section entitled "Facts", and not included as an Exhibit.

Respectfully submitted,
B.E. TILLEY, et al.
By /s/ CLIFFORD L. HARRISON
Of Counsel

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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3858

B. E. TILLEY, et al.,
Appellants,

vs.

THE MEAD CORPORATION,
Appellee.

ORDER
(Filed September 26, 1986)

In consideration of appellants' motion to include Exhibit 1 in their brief, I am advised by appellee that the same already appears at page 39 of appellants' brief.

I am of opinion that the said Exhibit 1 is nothing more than mere argument and that its presence in appellants' brief is innocuous at the worst because such facts as are stated in said exhibit are of no value unless supported by the record, and any conclusions which may be drawn by said exhibit are of no value unless supported by the law.

It is accordingly ADJUDGED and ORDERED that the said Exhibit 1 may remain in said brief for whatever value a panel of this court may assign to is.

/s/ ____________________
United States Circuit Judge

BERNARD COLEMAN BALDWIN III, Esq.
EDMUNDS & WILLIAMS
P.O. Box 958
916 Main Street
Lynchburg, VA 24505

**MEMORANDUM OF FACTS:
FIDUCIARY APPOINTMENT**

Va. Code §§ 64.1-116 to -121; 64.1-131;
58.1-1712 to 58.1-1715; 58.1-3806 to 58.1-3808

[X] Executor [ ] Administrator, c.t.a. [ ] Administrator

NAME OF DECEDENT: David H. Wall
DATE OF DEATH: 6/6/85
DECEDENT'S RESIDENT ADDRESS AT TIME OF DEATH (§§ 64.1-75 to -77): 28 Radford Village, Radford, VA

☐ Intestate. Decendent left no will, so far as I know (§§ 64.1-119)
☒ Testate. The writing admitted to record contains the true last will of the decedent, so far as I know (§§ 64.1-117)
☐ Decedent's will did not appoint an executor (§§ 64.1-116)
☐ Will empowers executor to sell/receive profits of realty (§ 64.1-120)

(The next block must be checked by a creditor or other person not a distributee moving for appointment under § 64.1-118):
☐ I certify that I have met the requirements of § 64.1-118.

NAME/ADDRESS, PERSON TO BE APPOINTED FIDUCIARY: Richard H. Wall, PO Box 3697, Radford, VA 24143

NAME/ADDRESS, RESIDENT CO-FIDUCIARY OR NON-RESIDENT FIDUCIARY (§ 26-59): ....

Estate values at time of decedent's death (if total value exceeds $1,000 complete probate tax return instead of these three lines)

$............... estimated value decedent's personal property
$............... actual or appraised value, decedent's Virginia real estate
$............... total value, decedent's estate

NAME AND ADDRESS OF SURETY OFFERED IF SECURITY REQUIRED (§ 26-9): None Required

I will faithfully perform the duties of my office to the best of my judgment. I have received a statement of my responsibilities pursuant to Va. Code § 64.1-122.1. I am:

☒ executor named in will
☐ legatee ☐ distributee
☐ ....

/s/ RICHARD H. WALL
SIGNATURE OF FIDUCIARY

Radford, VA:
CITY, ~~COUNTY~~

Acknowledged, subscribed and sworn to before me on

DATE: 8/24/88

/s/ J. D. HARMON
☒ Clerk ☐ Deputy Clerk

$20,000.00 bond (§ 64.1-120). If security is not required, indicate:

☒ Will relieves executor from giving security (§ 64.1-121)
☐ Va. Code § 6.1-18 standard is met
☐ Fiduciary: 1 of 3 or fewer beneficiaries/distributees (§ 64.1-121)
☐ Amount coming into fiduciary's hands does not exceed $5,000 (§ 26-4)

Taxes, fees, charges (Exceptions: §§ 26-4, 58.1-1712, 1713)
$..................
$..................
$..................
$..................

Order book No. .... Page ....
Bond book No. 16 Page 76
DATE: ORDER OF APPOINTMENT ENTERED: 8/24/88

A TRUE COPY:
TESTE: /s/ SUSAN C. NAFF, Deputy Clerk
Circuit Court, Radford, Va.
CC-1615 (1/85)

RESPONDENT'S

BRIEF

(20)

No. 87-1868

In The

Supreme Court of the United States

October Term, 1987

THE MEAD CORPORATION,

Petitioner,

v.

B. E. TILLEY, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

I. Whether contingent early retirement benefits are a "benefit under the plan" under 29 U.S.C. § 1344(a)(6).

II. Whether contingent early retirement benefits are a contingent liability under 29 U.S.C. § 1344(d)(1)(a).

III. Whether the funds Mead recouped were funds in excess of actuarial error.

IV. Whether Mead violated fiduciary duties in including funds set aside for contingent benefits in its asset reversion.

V. Whether an early retirement benefit is an earned benefit.

VI. Whether the issue of damages is properly before this court.

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STATUTE INVOLVED

This case concerns the interpretation of the Employee Retirement Income Security Act of 1974 ("ERISA"), and centers on the interpretation of the section which allocates surplus assets on plan termination, 29 U.S.C. §1344.

STATEMENT OF THE CASE

This is an action by five former employees ("employees") of The Mead Corporation to recover pension plan trust funds wrongfully withheld from them when the plan was terminated.

The Mead Corporation ("Mead") acquired Lynchburg Foundry Company in 1968. Subsequently, the Mead Industrial Products Salaried Retirement Plan ("the plan") was formed. The pension plan was a defined benefit plan. Under a defined benefit plan, funds are set aside in a trust account during an employee's tenure to satisfy the plan's liabilities. At the time of distribution, the employee is entitled to a benefit which is defined by the plan as opposed to a share of the trust fund. When Mead sold the Foundry in 1983, the pension plan was terminated. Mead kept over $10,000,000 of the trust fund assets it claimed to be in excess of the plan's liabilities.

The normal retirement age under the pension plan was 65. However, employees with 30 years or more credited service at the Foundry could retire with full benefits at age 62. Four of the five employees in this lawsuit, B. E. Tilley, Chrisley H. Reed, J. C. Weddle and William D. Goode, all had 30 years of credited service at the termination of the pension plan. William L. Crotts would have

had 30 years of credited service by the time he was age 64. *See,* Table 1.

The pension plan was formally terminated on August 1, 1983. Although the pension plan gave employees with 30 years of credited service the right to retire at age 62, all of the employees' benefits were figured on a retirement age of 65, the effect of which was to eliminate the early retirement benefits and significantly reduce the employees' lump-sum benefit. *See,* Table 1. The employees' loss was Mead's gain and it pocketed the difference.

SUMMARY OF ARGUMENT

This is a case involving five employees who contracted with Mead for an early retirement benefit to be paid to them when they reached age 62 with 30 years of credited service. Four of the five employees had over 30 years of credited service and were within a few years of enjoying these benefits when Mead unilaterally terminated the plan.

Subsequent to the filing of this case, all of the employees in this action had reached both of the requirements: 30 years of credited service and 62 years of age. However, when Mead terminated its pension plan, Mead recouped all of the funds set aside in the pension plan to pay for the contingent early retirement benefits. ERISA 29 U.S.C. §1344 sets forth six priority categories which must be paid upon a fully funded termination. The catch all included in the statute is §1344(a)(6) which requires "all benefits under the plan" to be paid at termination. Mead

takes the position that where Congress says "all benefits," the statute should be construed to mean "all accrued benefits." This position, however, is contradicted by the plain language of the statute and legislative history of ERISA.

In the original drafts of ERISA, the final priority category in the benefit sections included the word "accrued." In the last draft of ERISA, Congress took out the word "accrued" in passing the statute. In taking out the word "accrued," Congress was executing a compromise between the two houses. In the original Senate bill, an early retirement benefit was an accrued benefit. The House bill, on the other hand, gave an early retirement benefit no protection whatsoever.

The Conference Committee resolved the dispute. In the final draft of ERISA, an early retirement benefit was not an accrued benefit. At the same time, however, the word "accrued" disappeared from the final priority category upon termination, allowing the benefits to be paid on termination.

Further, Congress enacted additional language in the termination section of ERISA which required that an employer could only recoup funds after all liabilities to plan participants were paid. One definition of "liabilities" provides that Mead can only recoup funds due to actuarial error.

Actuarial error is a term of art. It can, but does not necessarily mean that the actuary made a mistake. Actuarial error is synonymous with overfunding. Overfunding can occur by better investment returns than expected,

or intentional overfunding. However, actuarial error does not include a change of the benefit assumptions.

Contingent early retirement benefits were benefits which would have had to be paid by the plan had the plan continued. By terminating the contingent early retirement benefits, Mead changed the benefit assumptions and failed to pay all liabilities of the plan.

ARGUMENT

I. A RULING FOR MEAD WOULD BE UNPRECEDENTED BOTH UNDER COMMON LAW AND UNDER ERISA.

A. In A Thousand Years Of English Common Law Trusts, The Contingent Benefit Was Always Satisfied Prior To The Termination Of A Trust Fund-ERISA Does Nothing To Change This.

1. All Pre-ERISA Decisions Required Funded Contingent Benefits To Be Satisfied Prior To Termination Of A Trust Fund.

Mead would have this court believe that what the employees ask of this court is shocking and unusual – nothing could be further from the truth. English common law has probably known a thousand years of trust law, and to this author's knowledge, no Appellate Court has ever allowed a trustee to terminate a trust fund without providing for contingent benefits. *See,* Annot. 45 A.L.R. 743, 746 (1926) (listing over 40 cases on the subject from 20 states and the United Kingdom); Annot. 123 A.L.R. 1427, 1436 (1939); Annot. 163 A.L.R. 852, 858 (1946); *see also, Hills v. Travelers Bank & Trust Co.*, 125 Conn. 640, 7 A.2d 652 (1939). What is unusual and unprecedented is

Mead's suggestion that contingent benefits can be unilaterally terminated without any compensation to the beneficiary.

2. Post-ERISA Courts Have Ruled For The Employees On The Issue Of Contingent Benefits Upon Termination.

Not only have the pre-ERISA courts held that the contingent benefits must be satisfied, post-ERISA Appellate Courts, which have reviewed this issue, have ruled that contingent benefits must be paid to the extent funds are available. *See, Amato v. Western Union Intern., Inc.*, 773 F.2d 1402 (2nd Cir. 1985), *cert. dismissed*, 474 U.S. 1113, (1986) (contingent early retirement benefits); *Tilley v. The Mead Corporation*, 815 F.2d 989 (4th Cir. 1987) (contingent early retirement benefits). Thus, courts, both pre-ERISA and post-ERISA, have required the payment of contingent benefits prior to the termination of a trust fund. Mead would have this court forget everything it ever knew about trusts and approach ERISA as a mystical statute with strange purposes and hidden meanings that only an ERISA alchemist would understand.

The truth of the matter is that ERISA changes common law very little. Reversions to the settlor were possible in common law trusts after *all benefits* were paid. *See,* Annot. 45 A.L.R. 743 (1926). ERISA has the identical language: *"All benefits"* as contained in 29 U.S.C. §1344(a)(6). At common law, all benefits were held to include contingent benefits. *See,* Annot. 45 A.L.R. 743, 746 (1926). The plain meaning of ERISA language suggests that "all benefits" mean the same as how courts have

interpreted these words for a thousand years – to include contingent benefits.

B. Mead Asks This Court To Grant Mead A Windfall So That It May Recoup Funds Set Aside In The Pension Plan For Early Retirement Benefits.

Four of the five employees in this case worked for over 30 years at Lynchburg Foundry Company. Mead takes the position that an employee could have been within one day of retiring at the termination of the plan and he would forfeit 100% of his early retirement benefit. Mead's position is entirely inconsistent with the common law of contracts. Had this been an ordinary contract contingency, such as a life insurance policy, Mead would have had to pay the fair market value of that benefit as of the date of the unilateral termination. For example, if the same employee purchased term-life insurance for a one-year term at a $100 premium and the company terminated his insurance contract in six months, this court would not hesitate to rule that the employee would be entitled to a $50 refund on the unexpired portion of the term. Mead, however, takes the position that once the contract is entered into the contingency must be fully performed. Therefore, if Mead were the insurance company, it would keep the entire premium under the logic that the employee is not yet dead and therefore is not entitled to recover any sums under the insurance contract despite the fact that in the next six months the employee may or may not die.

In *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971), the Fourth Circuit Court of Appeals held that a pension plan is a bargained-for benefit which is earned as

deferred compensation just as a salary is earned as immediate compensation and is not a gift on behalf of the employer that is revocable at the employer's whim. *Id.*

ERISA was enacted as a comprehensive statute to protect employee benefits. *See*, 29 U.S.C. §1001. Mead would attempt to convince this Court that ERISA was not enacted as a shield to protect employee benefits, but as a sword for the employer to be used against the employee. In fact, ERISA does just the opposite. By enacting broad and sweeping fiduciary duties upon the employer, Congress prohibited an employer from maintaining a pension plan for any reason other than the exclusive benefit of the employee. *See*, 29 U.S.C. §1104. To allow an employer to profit under these circumstances would be to violate those fiduciary duties.

II. SECTION 1344 REQUIRES PAYMENT OF CONTINGENT EARLY RETIREMENT BENEFITS.

A. Contingent Early Retirement Benefits Are A Priority Category 6 Benefit Under 29 U.S.C. §1344(a)(6).

1. The Termination Provisions Of §1344(a) Set Forth Six Priority Categories.

The Employee Retirement Income Security Act, 29 U.S.C. §§1000, *et seq.*, is the comprehensive federal statute which regulates all aspects of pension plan trusts including their termination. The controlling section in this case is 29 U.S.C. §1344, which provides for the allocation of fund assets on termination:

§1344. Allocation of Assets

(a) Order of priority of participants and beneficiaries.

> In the case of termination of a single employer defined benefit plan, the plan administrator *shall allocate* the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> . . .
>
> (5) Fifth, to *all other nonforfeitable benefits* under the plan.
>
> (6) Sixth, to *all* other benefits under the plan.

(Emphasis added.) The language of §1344(a) sets forth only two requirements which a benefit must meet in order to become a priority category 6 benefit: (1) it must be a "benefit," and (2) it must be "under the plan." The early retirement benefits in this action meet these requirements.

2. The Early Retirement Benefit Is A "Benefit."

An early retirement was specified as being a "normal retirement benefit" under the plan by the drafters of ERISA. This is set out with particularity in the definition of a "normal retirement benefit" under ERISA:

> The term "normal retirement benefit" means the greater of the *early retirement benefit* under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to –
>
> (A) medical benefits, and
>
> (B) disability benefits not in excess of the qualified disability benefit.
>
> For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan

> which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the *early retirement benefit* under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in §204(b)(1)(G) [29 U.S.C. §1054(b)(1)(G)].

29 U.S.C. §1002(22). (Emphasis added.)

The plain meaning of "benefit" also supports the employees' position. *Black's Law Dictionary* defines "benefit" in part as: "Advantage; profit; fruit; privilege; gain; interest." *Black's Law Dictionary*, 143 (5th Ed. 1979). The early retirement benefit in this case was a "privilege" or an "advantage" of the employees.

Thus, both the common law definition of "benefit" and the ERISA definition of "benefit" encompass a contingent early retirement benefit.

3. The Early Retirement Benefit In This Case Is "Under The Plan".

The second part of §1344(a)(6)'s two-part test is that a benefit must be "under the plan." In this case, the early retirement benefit was provided for in the plan at Article V, Section 2(b) of the plan.

> *Section 2. Early Retirement Income*
>
> . . .
>
> (b) If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V without any reduction of benefits.

(J.A. at p. 39.)

ERISA defines early retirement benefits as "under the plan" in the definition of a "normal retirement benefit."

> The term "normal retirement benefit" means the greater of the *early retirement benefit under the plan*, or the benefit under the plan commencing at normal retirement age.

29 U.S.C. §1002(22). (Emphasis added.)

The legislative history of ERISA demonstrates the meaning of the words "under the plan." In explaining the term "accrued benefits," Senate Report No. 93-383 pointed out that not all employee benefits are provided under a plan. "This term (accrued benefits) refers to pension or retirement benefits and is *not* intended to apply to certain ancillary benefits, such as medical insurance or life insurance, *which are sometimes provided for employees in conjunction with a pension plan*, and are sometimes provided separately." S. Rep. No. 93-383, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News, 4890 at 4935. (Emphasis added.)

It is important to note that early retirement benefits were not listed as an example of an ancillary benefit above as the Senate version of ERISA specifically included an early retirement benefit as an accrued benefit. *Id.* at 4936. The Conference Committee Report again distinguishes accrued benefits from ancillary benefits under the plan. "(T)he accrued benefit does not include the value of the right to receive early retirement benefits . . . or other benefits under the plan . . . " H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News, 5038 at 5054. For

an excellent example of an early retirement benefit which is *not* under the plan *see Sutton v. Weirton Steel Div. of Nat. Steel*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984), where the early retirement benefit arose out of a collective bargaining agreement, not the pension plan, and was payable from the corporate treasury, not the pension plan trust fund. Congress intended to mean the "under the plan" language to separate employee benefits which arose out of the employee benefit plan from those employee benefits provided outside an employee benefit plan.

The early retirement benefit in this case meets both of the requirements to be paid at termination under 29 U.S.C. §1344(a)(6) in that (1) the early retirement benefit is a benefit; and (2) the early retirement benefit is under the plan.

B. 29 U.S.C. §1344(d) Requires That The Funds Earmarked For Early Retirement Benefits Be Paid.

The assets of the trust fund do not automatically revert to Mead upon termination. It is Mead who must come before this court and affirmatively show why it is entitled to a reversion. The specific section of ERISA which determines when an employer may recoup funds is 29 U.S.C. §1344(d)(1):

> (d) *Distribution of residual assets; remaining assets*. (1) Any residual assets of a single-employer plan may be distributed to the employer if –
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

In this case, all liabilities have not been paid. The plan does not provide for a distribution in these circumstances. Mead has therefore violated (A) and (C) of §1344(d)(1) above.

1. ERISA Requires All Liabilities To Be Paid Before The Employer May Recoup Any Funds.

ERISA §1344(d)(1)(A) quoted above mandates that "all liabilities of the plan to participants and their beneficiaries must be satisfied before the employer may recoup any funds." *Id.* Since Mead cannot argue that early retirement benefits could not come within the word "all," Mead must argue that an early retirement benefit is not a liability to plan participants. The question then becomes "What is a liability?"

(a) Common Legal Usage Of The Term "Liability" Would Include Contingent Early Retirement Benefits.

What is a liability? The foremost legal source on definitions enlightens us on the ordinary meaning as follows:

> *Liability. The word is a broad legal term. It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely.* It has been defined to mean: *all character of debts and obligations;* amenability or responsibility; an obligation one is bound in law or justice to perform; *an obligation which may or may not ripen into a debt; any kind of debt or liability, either absolute or contingent,* express or implied; *condition of being actually or potentially subject to an obligation;* condition of being responsible for a possible or actual loss, penalty, evil, expense or burden; *condition which creates a duty to perform an act immediately or in the future;* duty to pay money or perform some other service; duty which must at least eventually be performed; *every kind of legal obligation,* responsibility or duty; fixed liability; legal responsibility; penalty for failure to pay tax when due; present, current, *future, fixed or contingent debts;* punishment; responsibility for torts; that which one is under obligation to pay, or for which one is liable; the state of being bound or obliged in law or justice to do, pay or make good something; the state of one who is bound in law and justice to do something which may be enforced by action; *unliquidated claim.*
>
> All the claims against a corporation. Liabilities include accounts and wages and salaries payable, dividends declared payable, accrued taxes payable, fixed or long-term liabilities, such as mortgage bonds, debentures and bank loans.

Black's Law Dictionary, 823 (5th ed. 1979). (Citations omitted.) (Emphasis added.)

The definition of liability is a very expansive one which easily encompasses the contingent legal obligation to pay early retirement benefits. It is noteworthy that Congress avoided more limited terms such as "contingent," "vested" or "nonforfeitable," and instead went to the much broader term "all liabilities."

More important than the common law meaning is the use of the term "liability" within ERISA. The term "liability" is the single most important word in §1344 and is the key to understanding its meaning. The context in

which the term "liability" is used not only defines its meaning but it integrates the entire section.

Section 1344(a) and §1344(d) were drafted at the same time by the same Congress and should be read *in pari materia* as being a part of the same statutory scheme. Section 1344(a) allocates benefits to employees which must be paid at termination. Section 1344(d)(1)(A) provides that all liabilities of the plans to participants must be satisfied upon a fully funded termination. The only liabilities which are paid to plan participants are the benefits to those participants. Thus, the liabilities to the plan under §1344(d)(1)(A) are the benefits set forth in §1344(a). A benefit to the employee under §1344(a) is a liability to the plan under §1344(d)(1)(A) and vice versa.

The naked term "liability" is not defined in ERISA. The terms "vested liability," 29 U.S.C. §1002(25), "accrued liability," 29 U.S.C. §1002(29), and "unfunded accrued liability," 29 U.S.C. §1002(30) are set forth. In each of the above-mentioned examples, the term "liability" is defined in terms of a "present value." Thus, a liability is the present value of the corresponding benefit (e.g., a vested liability would be the present value of a vested benefit. 29 U.S.C. §1002(25)). "Present value" is defined under ERISA as "with respect to a liability, means the value adjusted to reflect anticipated events." 29 U.S.C. §1002(27). Therefore, a benefit has a present value when it is anticipated that it will be paid in the future. The "present value" is the actuarially reduced amount of the future benefit.

One of the primary purposes of ERISA was to require a trust fund to provide for future benefits promised

under the plan. *See*, 29 U.S.C. §1001. An actuary funds the benefit because he anticipates that it will be paid in the future. It is this funded liability that Mead recouped and is the subject of this suit. Mead could only rightfully recoup under §1344(d)(1)(A) funds that were not allocated to pay anticipated future benefits. In further recouping funds allocated to pay contingent early retirement benefits, Mead recouped a liability which is prohibited by §1344(d)(1)(A).

The fact that early retirement benefits have an actuarial value and are a liability to the plan can hardly be disputed by either Mead or the PBGC. In fact, early retirement benefits must be included in the valuation of a qualifying bid under the purchase of annuity on the termination of a fully funded plan prior to an asset reversion to an employer as set forth in regulations promulgated by the PBGC. *See*, 29 C.F.R. §2619.25 (early retirement benefits).

> (a) Participants with a known retirement date. The value of an early retirement benefit for a participant whose retirement date is known (i.e., who has retired or has selected a retirement date) before the date of distribution is the cost of the benefit under the qualifying bid.
>
> (b) Participants with an unknown retirement date. The value of an early retirement benefit for a participant whose retirement date is not known before the date of distribution is determined under either paragraphs (b)(1) or (2) of this section, as appropriate.
>
> (1) If, with respect to all such early retirement benefits payable under the plan, the qualifying bid for the plan reasonably takes into account the probability that participants may retire at a date between

the earliest date early retirement benefits may be received and the normal retirement date, then the value of each early retirement benefit is its cost under the qualifying bid.

(2) If the plan administrator is unable to obtain a qualifying bid described in paragraph (b)(1), then the plan administrator may arrange PBGC to become responsible for the payment of such benefits in accordance with Subpart D of Part 2617 of this chapter. If the plan administrator so arranges, he or she will calculate the value of all such early retirement benefits in accordance with §2619.46(c). (In this event, the PBGC will provide these benefits as set forth in Part 2617 of this chapter.) If the plan administrator does not so arrange, then the value of each early retirement benefit is its cost under the qualifying bid. 46 FR 9497, Jan. 28, 1981, Redesignated and amended at 46 FR 32575, June 24, 1981; 50 FR 50899, Dec. 13, 1985.

29 C.F.R. §2619.25.

In later sections of C.F.R. regulations in the case of a lump-sum benefit, the PBGC ignores the value of early retirement benefits. 29 C.F.R. §2619.26. However, the PBGC gives no reason to explain why the PBGC would give disparate treatment to early retirement benefits in cases where the benefits are paid as an annuity or as a lump sum. If early retirement benefits are a liability where paid as an annuity, then surely they are also a liability if paid in lump-sum form.

(b) Federal Revenue Ruling 85-6 Defines Liability To Include Contingent Early Retirement Benefits Such As Those In This Case.

ERISA plans are governed not only by general law, but also under tax law. *See*, 26 U.S.C. §§401, *et seq*. Section

401(a)(2) of the I.R.C. requires it must be impossible under the trust instrument: "at any time prior to the satisfaction of *all liabilities* with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries. . . ." (Emphasis added.)

Almost the same language is used in 29 U.S.C. §1103(c) (1983) and in 29 U.S.C. §1344(d)(1)(A) (1983) discussed above. Both 29 U.S.C. §1344(d)(1)(A) and 26 U.S.C. §401(a)(2) use the term "all liabilities" in the context of what must be paid to employees before an employer may recoup funds. Both sections cover the same problem and should be read *in pari materia*. Whether the definition of "all liabilities" in the two sections includes funded contingent early retirement benefits is the crux of the employees' argument.

In an almost identical factual situation directly on point, Revenue Ruling 85-6 holds unambiguously that the definition of "all liabilities" in 26 U.S.C. §401(a)(2) includes funded contingent early retirement benefits of the sort the employees are claiming in this action.

The facts stated in the ruling are as follows: An employer with a pension plan covered under ERISA provided in the plan that a normal retirement age of 65 and the option that an employee with 30 years of service and age 55 could retire with full benefits. (The Mead plan is the same except that it requires age 62 instead of 55.) The employer proposed to terminate the plan. In its proposal, the employer would not pay any amount for the value of the early retirement subsidy unless the participant met

both the age and years of service criteria. (Mead is maintaining the same position in this suit.)

In rejecting the employer's proposal, the Revenue Ruling noted that, for those employees who could later meet the pre-termination conditions, the option of early retirement was a liability under 26 U.S.C. §401(a)(2) and therefore must be paid to the employee. "Until the liabilities for these benefits are satisfied, the employer may not recover any remaining funds as surplus resulting from actuarial error without disqualifying the plan." Four of the employees, Tilley, Reed, Weddle and Goode, have over 30 years of service and will shortly reach the age of 62, therefore satisfying the pre-termination conditions. This is exactly the situation which Revenue Ruling 85-6 addressed. At least these four employees should recover under this ruling. The other employee relies on other sections of this brief for recovery.

(c) The Federal Regulation's Definition Of "Liabilities" Includes Contingent Benefits.

I.R.C. regulations set forth that employees do not need to satisfy all the requirements for immediate payment of a benefit in order for that benefit to be a "liability."

> The term "liabilities" as used in §401(a)(2) includes both fixed and *contingent* obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute "liabilities" within the meaning of that term. It must be impossible for the employer (or other non-employee) to recover any amounts other than such amounts as remain in the trust because of erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect, irrespective of whether the obligations to employees have their source in the trust instrument itself, in the plan of which the trust forms a part, or in some collateral instrument or arrangement forming a part of such plan, and regardless of whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.

26 C.F.R. §1.401-2(b)(2) (emphasis added).

The fact that the employees did not yet have all of the requirements for an early retirement benefit does not prevent the benefit from being a "liability" which must be satisfied before Mead may recoup any funds.

2. The Plan Did Not Provide For A Distribution To Mead In This Case.

In Section 3 of its brief (p. 44), Mead admits that it may only recoup those assets which result from "actuarial error." Mead is forced to make this concession as the plan, IRS regulations and case law are unanimous on this conclusion. *See*, Mead Pension Plan Article XIII, Section 4(f) (J.A. at p. 63), Treas. Reg. §1.401-2(b)(1), *Intern. Union, Auto v. Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984).

IRS regulations found in 29 C.F.R. §1.401(2)(b)(1) help define "actuarial error."

> (b) Meaning of "liabilities." (1) The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. *A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements* even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding. For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with the provisions of the plan. Upon such liquidation it is found that $950,000 will satisfy all the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneous actuarial computation. *If, however, the surplus of $50,000 had been accumulated as a result of a change in the benefit provisions or in the eligibility requirements of the plan, the $50,000 could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation.*

(Emphasis added.) Note that the regulations require that the surplus not be the result of a change in benefits. This is exactly what Mead did in this case. Mead is announcing that it will not pay the contingent early retirement benefits so there will be an unanticipated surplus and that surplus, Mead claims, is "actuarial error."

To arrive at "actuarial error," Mead is correct in saying that the actuary need not err. On the date of termination, investments may have been more favorable than originally anticipated, or the actuary may have correctly anticipated, but overfunded in an excess of caution. Mead should not be penalized by its caution in overfunding and should be rewarded for its prudent investments. Both examples are classic "actuarial error." Nevertheless, note that the classic actuarial error has remained untampered.

If Mead is allowed to change the "anticipated" events (actuarial assumptions) then the term "actuarial error" is meaningless and ERISA has no safeguard. Mead could just as easily announce that it was paying no benefits, vested, nonforfeitable or otherwise, and the unexpected surplus was "actuarial error."

The term "actuarial error" has been defined by the courts as those assets remaining when fixed and contingent liabilities are paid. *See, Intern. Union, United Auto. v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984). A contingent early retirement benefit is a contingent liability. By Mead's failure to pay this contingent liability, it has recouped more than mere actuarial error and is in violation of both plan provisions and §1344(d)(1)(A) of ERISA.

III. CONTINUED EARLY RETIREMENT BENEFITS ARE EARNED BENEFITS AND NOT MERE EXPECTATIONS.

Mead argues that a contingent early retirement benefit is an unearned benefit in the hopes of wedding the *Tilley* decision to the far more controversial and infinitely more sweeping *Blessit, infra,* decision. *See, Blessit v. Retirement Plan for the Emp. of Dixie Eng. Co.,* 817 F.2d 1528 (11th Cir. 1989) *rev'd* 848 F.2d 1164 (11th Cir. 1988).

In *Blessit,* the Court of Appeals for the Eleventh Circuit initially ruled that unearned benefits from mere benefit expectations from years not yet served were payable under 29 U.S.C. §1344(a)(6). The court in *Blessit* reversed its initial ruling by the full panel sitting *en banc.* Mead cites the *en banc Blessit* decision as authority on its behalf. However, in footnotes 22 and 23 of the *en banc* decision, the court specifically addressed whether *Amato* and *Tilley* were an earned benefit or a mere expectation and distinguished the *Amato* and *Tilley* cases in holding that the benefits sought in the original *Blessit* case were mere benefit expectations while the benefits sought in the *Amato* and *Tilley* cases were earned. *Blessit,* 848 F.2d at 174. The *en banc* panel of the *Blessit* court held that the reasonable expectation addressed by the *Amato* court is conceptually different from the justifiable expectation idea addressed in the *Blessit* case.

Amato v. Western Union Intern., Inc., 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed,* 474 U.S. 1113 (1986), concerned an employee's reliance on the continued viability of an early retirement provision. In contrast, the *Blessit* focus was on whether an employee could reasonably expect to

accrue benefits *after* a plan terminates. The conclusion reached by the *Blessit* court is that an employee is entitled to expect that an early retirement provision in a plan will not be deleted by amendment shortly before an employee qualifies. However, the employee can reasonably expect to receive benefits under those provisions only to the extent he earns them through *actual* – not anticipated – years of service. *See, Blessit,* 848 F.2d at 1174 (footnote 22); *Chait v. Bernstein,* 835 F.2d 1017 (3d Cir. 1988); *Van Orman v. American Insurance Co.,* 680 F.2d 301, 310 (3d Cir. 1982).

The *Blessit* court distinguishes *Tilley* in that the *Tilley* benefits are based on years actually served.

> In *Tilley,* the parties stipulated that "plaintiffs had no right to continued accrual of benefits after the plan's termination." 815 F.2d at 991. Five of the six plaintiffs who sought early retirement benefits in *Tilley* had fulfilled the 30 years' service requirement and lacked only a few years on the age requirement (reaching age 62) when the plan terminated. The court awarded these plaintiffs the full value of their early retirement benefit, actuarially reduced to reflect that the plaintiffs were a few years shy of the age contingency.
>
> The sixth plaintiff was two years away from meeting the years of service requirement for the early retirement benefits (i.e., he had worked 28 years). The court dealt separately with this plaintiff by requiring that his benefit be actuarially reduced from age 64, rather than from age 62 as with the other plaintiffs, thereby recognizing that because this plaintiff had not met the years of service requirement, he should receive a smaller benefit relative to the other plaintiffs.
>
> *Blessit, supra,* 848 F.2d at 1174.

The *Blessit* court felt that the way the *Tilley* court chose to reduce the sixth plaintiff's benefit was inferior to the method used in *Amato*. However, the *Blessit* court pointed out that the important point is that *Tilley* recognized, albeit implicitly, that the employees who had not accrued the requisite number of years of service should receive a smaller portion of their early retirement benefit than the employees who had met the service requirement. 848 F.2d at 1174 (n. 23). Therefore, Mead's reliance on the *Blessit* decision or their assertion that the *Tilley* benefits are unearned is misplaced.

The only two contingencies presented were age and credited service. Mead would have this court believe that those two contingencies are unusual and in some way bizarre when in fact age and credited service are the only two contingencies ever used to determine whether a benefit has been earned. The only difference between a contingent retirement benefit and an age 65 retirement benefit is that a contingent retirement benefit has a retirement age of 62 rather than 65 with a 30 year cliff vesting rule as opposed to a ten year cliff vesting rule for the normal retirement benefit which was the law at the time of the *Tilley* termination. It is therefore an inescapable conclusion that the early retirement benefits in this case are earned benefits earned by the many years of credited service by the employees every bit as much as the normal retirement benefits they earned by those same years of credited service.

IV. LEGISLATIVE HISTORY OF ERISA SUPPORTS EMPLOYEES' POSITION AND UNACCRUED EARLY RETIREMENT BENEFITS ARE PAYABLE IN §1344(a)(6).

It is *not* necessary that the employees show that the benefit is accrued. By definition, a priority category 6 benefit cannot be accrued. All accrued benefits are nonforfeitable as of termination. *See*, 26 U.S.C. §411(d)(3)(A) (1983). Therefore, an accrued benefit would necessarily be covered in priority categories 1 through 5. *See*, *Amato v. Western Union Intern., Inc.*, 773 F.2d at 1415; 4 Employment Coordinator §B-21, 431 (Dec. 1985 supp.). The *Amato* case dealt with many issues, including whether 29 U.S.C. §1344(a)(6) required payment of unaccrued early retirement benefits or a partial termination of a pension plan. After a lengthy discussion, the court concluded that the unaccrued early retirement benefits must be paid. The court noted in part:

> The Joint Explanatory Statement of the Senate-House Conference Committee on the history of ERISA §4044 supports appellants' argument that category six is not limited to accrued benefits. H.Conf.Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5154-55. The House version of the bill included among the benefits for which funds had to be allocated a category entitled "other accrued benefits." The Conference rejected this version and substituted "all other benefits under the Plan," the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

Amato, supra, at 1415.

When §1344(a)(6) says that priority category 6 includes all benefits, it means exactly that: ALL BENEFITS. The statute does not say "all accrued benefits" or "all nonforfeitable benefits," it merely says "all benefits."

The employees' contention that Congress purposely deleted the word "accrued" on §1344(a)(6) is supported by looking at the rest of §1344. In §1344(a)(1), the act refers to an individual's "accrued benefit." In §1344(a)(2), the act again refers to "accrued benefit." Finally, §1344(a)(6) refers to "all other benefits." Congress understood the term "accrued" and used it twice earlier in the section. By not referring to the term later in the section, Congress did not intend to use that limiting term with reference to that section. "Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally assumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Further, Congress would have had to make this error not once, but twice. In §1344(d)(1)(A), Mead may only recoup benefits if "all liabilities of the plan to participants or their beneficiaries have been satisfied." Congress failed to use the term "vested liability" defined in 29 U.S.C. §1002(25) or "accrued liability" found 29 U.S.C. §1002(29) or to otherwise limit the term "all liabilities." To rule for Mead, this court would be forced to assume that Congress made two serious drafting errors, which coincidentally parallel each other and coincidentally are in the same section.

That Congress accidentally or unintentionally left out the word "accrued" in category 6 is unsupportable. It is not for the Supreme Court to add, subtract, delete or distort the words Congress used. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 546 (1951). Mead is asking this court to add what Congress thoughtfully omitted.

The key argument in the *Amato, supra*, case was over the language of 29 U.S.C. §1344(a)(6) which states "all other benefits under the plan." It is particularly important since all other nonforfeitable benefits are set forth as a priority 5 category under 29 U.S.C. §1344(a)(5) and all accrued benefits are considered nonforfeitable as of termination. Therefore, 29 U.S.C. §1344(a)(6) benefits would be meaningless if only accrued benefits were paid upon termination.

The most important point to this entire case and the point on which the *Amato* case was decided is that Congress, in its earlier drafts of determination sections of ERISA, had included as its final category "all other accrued benefits." They left the word "accrued" out of the final draft of ERISA. The only way for this court to rule in favor of Mead is to literally pen back in the word "accrued" which Congress purposely crossed out. This court, in an exercise of what would be nothing less than judicial legislation, would go back into the Conference Committee and change the wording of the statute so that it now completely disagrees with Congressional intent. *See, Amato, supra*, 773 F.2d at 1415.

It is also important to note that there was considerable legislative debate over that one small word

(accrued). It was not an accident or case of sloppy drafting that the word "accrued" does not appear in 29 U.S.C. §1344(a)(6) but was, in fact, the result of a thoughtful compromise.

Early retirement subsidies were considered to be within the meaning of accrued benefits in the Senate Finance Committee bill S.1179. The bill did not define "normal retirement age." Insteau, the Senate Finance Committee Report, 383 at 51 (I Leg. Hist. at 1199) stated:

> "The normal retirement age is to be defined by regulations. It is expected that a minimum and maximum age will be taken (between 55 and 65) and the normal retirement age in this range will be at the age at which the retirement benefit has the greatest actuarial value." *Id.*

C.f. 29 U.S.C. §1002(24).

A benefit at any age has a greater actuarial value than that same amount at a later age. An unreduced benefit starting at age 62 has a greater actuarial value than the same benefit starting at age 65. That is nothing more than a time value of money. One hundred dollars in one's hand today is worth more than $100.00 in one's hand three years from now. Thus in most cases, the value of an early retirement benefit, would be payable on termination as an accrued benefit.

The administration's recommendations to the Conference Committee (III Leg. Hist. 5082-5083) and the Conference staff summary to the Committee of the differences in the accrued benefit provisions in the House and Senate bills (III Leg. Hist. 5170-5171) both confirmed the reading that the Senate bill protected the subsidies by having them ratably accrue over the employee's working years.

Since the subsidies were ratably accrued over time in the Senate bill, the ratable portion accrued at any point in time would also vest under the vesting rules, and would therefore be guaranteed under the insurance provisions, and assets would be allocated to provide that ratable portion under asset allocation rules. Early retirement benefits were an accrued benefit.

The House bill did none of this. Normal retirement age was expressly defined in the House bill at 65 and that definition made no mention of an adjustment for protecting subsidies, as had the Senate bill. H.R. Rep. No. 93-807, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S. Code Cong. and Admin. News 4670 at 4726. Thus, the subsidies were not accrued *pro rata* for the years worked and were not guaranteed before the employee fully qualified to receive them.

This was the state of Congress going into the Conference Committee. The Senate, on one hand, not only protected an early retirement subsidy at termination, but protected the retirement subsidy to the amount earned by credited service as a vested (accrued) benefit. The Conference Committee compromised. The Conference Committee took subsidies out of the meaning of accrued benefits by adopting the House bill provisions on how normal retirement age was defined (i.e., a normal retirement is a fixed 65 years of age). H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. and Admin. News 5038 at 5054. *See also*, 29 U.S.C. §1002(24). The Conference report in this section specifically held " . . . also the accrued benefit does not include the value of the right to receive early retirement benefits." This language was straight from the House report

on the House bill and appeared both in H.RAP 807 (the Ways and Means report) and in the Education and Labor report on Title 1 of the House bill. *See* the explanation starting at II Leg. Hist. 3293. However, at the same time the Committee took early retirement benefits out of accrued benefits, they took the word "accrued" out of the last category of benefits which had to be allocated to employees on termination and instead used the more sweeping language "all other benefits under the plan," the current language of 29 U.S.C. §1344(a)(6). Further, the conferees retained an early retirement benefit as a "normal retirement benefit." 29 U.S.C. §1002(22).

This court has held that where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation which was deleted was not intended. *Russello v. United States*, 464 U.S. 16, 23-24 (1983). *See also, Arizona v. California*, 373 U.S. 546, 580-581 (1963).

For this court to hold that accrued benefits are the only benefits which may be payable under §1344(a)(6) would be to judicially exclude the very benefits which Congress intended to include and to pen in the very language Congress purposely and deliberately deleted from §1344(a)(6).

It is also important to note that the conferees retained §1344(d)(1) in the act. This section provides that an employer may only take an asset reversion after *all* liabilities under the plan have been paid. This section did not appear in the House bill. By expressly including the broad language requiring all liabilities to be satisfied, the

conferees included contingent liabilities such as contingent early retirement liabilities, would be paid prior to any recoupment by the employer in the case of termination of a plan.

V. RESPONDING TO MEAD'S ARGUMENTS.

A. Section 1344(a) Sets Forth Priority Categories Which Must Be Paid On Termination Of A Fully Funded Pension Plan.

The PBGC and Mead attempt to convince this court that §1344(a) merely allocates assets and does not create independent benefit rights. Such an argument is to read §1344(a) out of context. When a pension plan terminates, there is a pool of assets which must be distributed. Much like a liquidation of a corporation or a debtor in bankruptcy, certain obligations are paid before others. In both of the above cases, certain obligations which would not have been entitled to immediate payment without the liquidation may be paid early because of it, to the extent funds are available. A stockholder in a corporation or an over-secured creditor with a long-term note are examples of this. The six preferred benefit classes of §1344(a) must be paid before Mead may recoup any funds. 29 U.S.C. §1344(d)(1)(A). Essentially, Mead is in a "7th" category. In the "trickle down" method which §1344 provides, Mead is at the bottom of the ladder. 29 U.S.C. §1344(d)(1)(A). Section 1344(a) provides that the plan administrator "shall allocate" available assets in the above order. The language is mandatory. The benefits in §1344(a)(6) must be paid, if available, before any recoupment.

B. Mead's Reliance On *Ashenbaugh* Is Misplaced.

Mead assails the employees' position in the case of *Ashenbaugh v. Crucible, Inc. 1975 Salaried Retirement Plan*, 854 F.2d 1516 (3rd Cir. 1988). The case does not attack the employees' position before this court.

In *Ashenbaugh*, the petitioning employees were claiming that they were entitled to full unreduced early retirement benefits. 854 F.2d at 1521. The employees in *Ashenbaugh* were asking for a subsidy over and above the normal retirement benefit. "The term normal retirement means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U.S.C. §1002(22). The *Ashenbaugh* court correctly held that the employees were not entitled to these excesses and noted that other issues were not raised and therefore not decided. *See* 854 F.2d at 1521, p. 7.

Further, the *Ashenbaugh* court chose not to address the issue of whether an employee with 30 years of service who was not yet age 62 at the time of the termination and who subsequently attained age 62 became entitled to receive benefits calculated under the early retirement benefit as such an assertion was not before the court. *See, Ashenbaugh*, 854 F.2d at 1521 (n. 7). Such an issue would have vital importance in this case as four of the five employees in this case had 30 years of credited service and had subsequently attained the age of 62. In fact, the lead plaintiff, B. E. Tilley, retired during the pendency of this appeal at age 62, just as he had always planned.

C. 29 U.S.C. §1344(a)(6) Is Not Limited To Accrued Benefits.

Both Mead and the PBGC assert that only accrued forfeitable benefits are encompassed by §1344(a)(6). Such a reading is totally untenable. Any category 6 benefit cannot be a nonforfeitable benefit because all nonforfeitable benefits were already paid in category 5. Under 26 U.S.C. §411(d)(3) and Article XIII, Section 4(h) (J.A. at 63) of the Mead plan, all accrued benefits are nonforfeitable on termination. Thus, all accrued benefits would be nonforfeitable on termination and would also be paid in category 5.

To counter this argument, Mead and the PBGC both make arguments that because Congress mandated accrued benefits to be considered *non*forfeitable on termination, then on termination these benefits should be considered forfeitable (just the opposite). Ludicrous as this seems, it is exactly what the Mead brief, at p. 16, and the PBGC's brief are arguing. Surely Congress understood what it was doing when it required all accrued benefits to be *non*forfeitable on termination.

Nevertheless, even if the court accepts Mead's argument, it does not exclude the possibility that there are other forfeitable benefits in category 6. Nowhere in either Mead's brief or that of the PBGC do they point to any authority whatsoever which would show that there is merely one type of forfeitable benefit. Mead's position and that of the PBGC essentially is that the early retirement benefits are forfeited by the employees on termination of the plan. Are they not then forfeitable benefits? It is unquestioned that all forfeitable benefits must be paid

pursuant to §1344(a)(6). *See*, 29 C.F.R. §2618.16. Therefore, contingent early retirement benefits should be paid.

D. REA Is Not Determinative Of Congressional Intent.

On pages 38-40 of its brief, Mead argues that the Retirement Equity Act ("REA") demonstrated Congressional intent that contingent early retirement benefits were not to be paid on termination. In fact, Mead notes that "the REA stands as the best evidence that the employees' claims in this case must be rejected." Mead's emphasis is misplaced. This court noted in *Russello v. United States*, 464 U.S. 16, 27 (1983) that "it is well settled that the views of the subsequent Congress form a hazardous basis for inferring the intent of an earlier one."

VI. THE ISSUE OF DAMAGES WAS PROPERLY DECIDED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Mead argues that the United States Court of Appeals for the Fourth Circuit abused its discretion in reaching the issue of damages. To support this, Mead argues that the issue of damages was not argued or raised at the court below.

In the employees' first brief supporting their Motion for Summary Judgment to the United States District Court for the Western District of Virginia, the employees argued the issue of damages, including a table on damages which was made a part of the first District Court brief. This same table appeared verbatim in the brief

which was filed before the Fourth Circuit and the issue of damages was again argued by the employees.

Mead boldly asserts that the issue of damages was not raised before the District Court in summary judgment hearings and states that the table of damages appeared for the first time in the Fourth Circuit. This court need only examine the record to discover the falsity of Mead's arguments.

For reasons known only to itself, Mead chose not to counter the employees' arguments of damages until Motion for Rehearing before the Fourth Circuit. By that time, the Fourth Circuit had already reached a decision on the employees' damages and Mead had waived any right it had to contest same.

CONCLUSION

The unreduced early retirement benefit in this case was available at age 62. Many retirement plans have an age 55 unreduced early retirement plan with 30 years of service. Early retirement may not seem important to Mead, but it is the lifelong dream of many employees. An early retirement benefit may cause an employee to pick a company or stay with a company.

Imagine an employer who starts an engineering firm who manages to lure some of the top young talent in the industry by offering a lucrative early retirement program. Years later, as his employees approach the early retirement age, the employer terminates the plan and recoups the very benefits which were the incentive for the

employees to come with that firm. Did Congress intend this result?

What Mead seeks to do in this case is to wiggle out of paying any compensation whatsoever for the termination of a bargained-for benefit. All the employees in this case are asking for is the present value of that benefit. They ask that it be determined on the number of years they actually worked and their age. All they want is the present value of what they were contractually promised.

In its statement of policy for ERISA found at 29 U.S.C. §1001, Congress sought to protect employees' rights to promised benefits and promote pension plans. However, under Mead's approach, ERISA pays a cash bonus, a rebate, to employers who terminate their pension plan. Mead claims that employers may pocket money allotted for certain benefits such as early retirement benefits which unquestionably would have had to have been paid had the plan continued. Companies are realizing this bonus and terminating plans at an incredible rate. *See*, PBGC Brief at pp. 22-23. Surely, Congress did not intend to reward employers who cancel benefits and terminate plans. Congress would have been clearer if it had intended to interrupt a thousand years of trust and contract law to allow Mead to recoup contracted for trust benefits before paying contingent liabilities.

For the foregoing reasons, respondents request this court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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TABLE 1

Employees' Damages for Improper Actuarial Reduction

EMPLOYEE	AGE AT RETIREMENT	CREDITED SERVICE	EARLY* RETIREMENT AGE	BENEFIT PAID	EARLY** RETIREMENT AGE BENEFIT	DIFFERENCE***
B. E. Tilley	57.500	35.0833	62.0000	$87,108.74	$100,175.05	$13,066.31
W. L. Crotts	61.4167	27.0833	64.3333	87,552.03	90,467.51	2,915.48
C. H. Reed	58.3333	30.8333	62.0000	69,882.45	80,364.81	10,482.37
J. C. Weddle	57.4167	36.0833	62.0000	50,800.35	58,420.40	7,620.05
W. D. Goode	59.0833	30.4167	62.0000	83,923.93	96,512.52	12,588.59
TOTAL DAMAGES						$46,672.80

*The Early Retirement Age is the earliest age at which the employee could have retired with full benefits.

**The Early Retirement Age Benefit is determined by figuring the actuarial reduction of 5% per year from the Early Retirement Age instead of the age of 65. In most cases this would be obtained by multiplying the benefit paid by the number 1.15. To calculate Mr. Crott's Early Retirement Age Benefit, one would use only 0.6667 of a year (65 - 64.333 = 0.6667) and hence the number 1.0333 should be used.

***The Difference is the difference between the Benefit Paid and the Early Retirement Age Benefit.

REPLY BRIEF

(23)

No. 87-1868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE MEAD CORPORATION,
Petitioner
v.
B.E. TILLEY, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

Mead made four basic points in its brief on the merits ("Mead's Brief"). First, ERISA § 4044(a)(6) is merely part of an allocation provision that neither creates benefits nor requires payment of benefits that are as yet unearned "expectations" under the terms of a plan. Mead's Brief at 12-30. Second, partial satisfaction of the Plan's requirements for receiving subsidized early retirement benefits creates neither accrued benefits nor contingent liabilities that must be paid upon plan termination. *Id.* at 31-43. Third, because the surplus remaining in the Plan after satisfaction of all liabilities was due to "actuarial error," the reversion to Mead under the Code and ERISA was proper. *Id.* at 44-45. Finally, the court below abused its discretion in deciding the damages issue. *Id.* at 45-48. The points raised by the Employees and their amici are addressed below.

I. ACCRUED BENEFITS.

The Employees contend that the subsidized early retirement benefits at issue here are benefits which they have earned under the Plan and the statute. Employees' Brief at 24. The AFL-CIO and AARP argue that the early retirement subsidies at issue constitute accrued benefits. AFL-CIO's Brief at 3-4 & n. 4, 17 & n. 12; AARP's Brief at 15-17. Both contentions are wrong.

A. Under the Plan.

Under the provisions of the Mead Plan, subsidized early retirement benefits are provided only if an employee of Mead retires from Mead after attaining age 62 and accumulating 30 years or more of credited service.[1] The service of each Employee with Mead was severed before each satisfied these criteria, and in fact none of the Employees will ever meet them. *See* Mead's Brief at 4 & n. 2. The Plan expressly reserves to Mead the right to terminate it. Art. XIII § 4(a), J.A. 61. However, it contains no provision making a portion of the early retirement benefits payable to participants who have not satisfied all criteria for earning them. Thus, the subsidized early retirement benefits in issue were not benefits that the Employees had "earned" or "accrued" under the Plan.

B. Under the Statute.

Nor were the claimed benefits "earned" or "accrued" under the terms of the statute. Code § 411(a)(7)(A)(i) provides that, under a defined benefit plan like Mead's, "the employee's accrued benefit under the plan [is that benefit which is] expressed in the form of an annual benefit commencing at normal retirement age." No portion of an early retirement subsidy is included in the accrued benefit. *See* Treas. Reg. § 1.411(a)-7(a)(1)(ii). Under ERISA only the "accrued benefit" must be earned more or less ratably during a participant's service with the employer. Code § 411(b). Only the "accrued benefit" is required to be vested under one of the vesting schedules provided in Code § 411(a)(2), or upon attainment of normal retirement age, Code § 411(a), or upon plan termination, Code § 411(d)(3), and under ERISA only the "accrued benefit" was protected from reduction or elimination under the anti-cutback rule of Code § 411(d)(6).

[1] Under Section 2(b) of Article V of the Plan (J.A. 39), only an individual who is a "Participant" who has 30 or more years of "Credited Service" and who elects to retire on or after attaining age 62 is entitled to a full, unreduced pension prior to age 65. Under Section 10 of Article I (J.A. 29) and Section 8 of the same article, as amended (J.A. 83), to be a Participant at attainment of age 62, an individual must be a full-time employee of Mead or one of its subsidiaries or affiliates.

C. Under the Legislative History.

ERISA's legislative history confirms that Congress decided not to treat subsidized early retirement benefits as "accrued benefits." The Senate proposed a version of ERISA that included a provision requiring that early retirement subsidies be taken into account in calculating the accrued benefit. S. Rep. No. 383, 93d Cong., 2d Sess. 1, 51 (1974), *reprinted in* I Legislative History of [ERISA] ("ERISA Leg. Hist.") 1069, 1119. The House disagreed and proposed that such subsidies be ignored because of cost considerations. H. Rep. No. 807, 93d Cong., 2d Sess. 1, 60 (1974), II ERISA Leg. Hist. 3121, 3180. Mead's Brief at 33-34 & n. 28. The Administration and congressional staff noted those differences and recommended that the House version be accepted. The Administration stated that it opposed "the Senate provision requiring that subsidized early retirement be taken into account in determining accruals, because it will be extremely costly to many employers and may, in fact, result in a compensating reduction in benefits." Administration Recommendations on H.R. 2, III ERISA Leg. Hist. 5047, 5084. Congressional staff agreed, recommending that the accrual rules apply "*only* to the benefit payable at or after normal retirement age (i.e., it would *not* take account of subsidized early retirement . . .)." Summary of Differences Between Senate and

House Versions of H.R. 2, III ERISA Leg. Hist. 5151, 5171 (emphasis added).

The Conference Committee chose the House version: "Under the conference substitute, the term 'accrued benefit' refers to pension or retirement benefits. The term does not apply to ancillary benefits . . . . Also, the accrued benefit does not include the value of the right to receive early retirement benefits." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 1, 273 (1974), III ERISA Leg. Hist. 4277, 4540. The effect of this choice was to exclude subsidized early retirment benefits from "accrued benefits" under ERISA and to deny to such benefits any of the key protections that were extended only to accrued benefits. *See supra* at 2-3.

D. Under Agency Interpretations.

The IRS and the PBGC specifically approved the termination in this case. Mead's Brief at 5. Moreover, in literally thousands of similar determinations neither agency has ever required payment of subsidized early retirement benefits that have not been fully earned. *Id.* at 24-27. Other than the decision below and that in *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986), the Employees and their amici are unable to cite a single authority that requires payment of any portion of a subsidized early retirement benefit at plan termination to a participant who has not satisfied the plan's conditions for earning it at the date of termination.

As explained in Mead's Brief (at 34-37), in a few controversial rulings and determinations the IRS sought for a brief period to establish that subsidized early retirement benefits were "accrued benefits" protected by the anti-cutback rule of Code § 411(d)(6). The essential holding of *Amato* constitutes the only judicial acceptance of that view. *See* Mead's Brief at 36 & n. 33. The Government's brief supporting that position in *Amato*, however, claimed no statutory basis for the position, admitted that the legislative history of ERISA tends to go the other way, and essentially asked the Second Circuit to defer to the determination of the IRS in that case.[2]

Whatever the reasons for this brief foray by the IRS, it has now abandoned that position. Mead's Brief at 33 n. 27, 36-37. There is thus no longer any support for the position taken by the Government in *Amato*, which was clearly a key basis for the Second Circuit's decision in that case.

E. The Retirement Equity Act.

The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), also shows that the Employees' unearned retirement benefits were not protected under ERISA.[3] Although REA did not make early retirement subsidies part of the accrued benefit, it amended Code § 411(d)(6) to add protection from cutback for benefits like those involved in this case. This provision was explicitly made prospective only, however, and there is little credible support for the claim that it codified prior law. Mead's Brief at 37 n. 34.

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[2] Mead's Brief at 37. The Argument portion of the Government's amicus brief in *Amato* is reprinted in the Appendix to this brief at 1a-5a.

[3] Mead does not argue that REA proves what the 1974 Congress intended when it enacted ERISA. The views of a subsequent Congress generally shed little light on the intentions of an earlier legislature. *See United States v. Price*, 361 U.S. 304, 313 (1960); *cf. Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-30 (1942); *Walt Disney Productions v. United States*, 480 F.2d 66, 68-69 (9th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974). What a later Congress *actually does* is always relevant, however, and in 1984 Congress evidently determined both that early retirement benefits and retirement-type subsidies were unprotected and that limited protection should be extended to them. What the REA Congress thought the ERISA Congress meant might carry little weight, *see Mackey v. Lanier Collections Agency & Service, Inc.*, —— U.S. ——, ——, 108B S. Ct. 2182, 2190-91 (1988), but what the REA Congress did confirms that there was no legal protection for early retirement benefits prior to 1984.

In any event, REA does no more than protect plan participants from the elimination of a plan's early retirement subsidy by prorating a participant's subsidized benefit (considering only the participant's service up to the time of plan amendment or termination) and requiring that prorated benefit to be paid if and when the participant later satisfies all plan criteria for the benefit. As the legislative history of REA and recently promulgated Treasury regulations demonstrate, if an employee's service with the employer maintaining the plan is severed prior to satisfying the conditions for earning an early retirement benefit, none of the benefit is payable. Mead's Brief at 33 n. 27, 37-40. In the instant case, all of the Employees were severed from service with Mead, cutting off all possibility that they would ever earn the subsidy.[4] In sum, early retirement benefits are not part of a participant's accrued benefit, either before or after enactment of REA. Even if the protections of

[4] This Court need not dwell upon the assertion made in passing by AARP that the Employees would not have suffered a separation from service from Mead if they continued to perform the same jobs for the new employer that purchased the Lynchburg Foundry Company from Mead. AARP's Brief at 18. No record evidence shows that the Employees continued to work for the Foundry, and, after the sale by Mead, the Foundry would in any event have been a completely unrelated employer. Although the IRS has applied a "same desk" rule for purposes of determining entitlement to certain favorable tax averaging rules under Code § 402(e), *see, e.g.*, Rev. Rul. 79-336, 1979-2 C.B. 187; Rev. Rul. 80-129, 1980-1 C.B. 86, there is no case, regulation, or precedential ruling extending any similar doctrine to the plan qualification requirements of the Code, such as Code §§ 411(a), 411(d)(3), and 411(d)(6), and AARP cites none. Although Code § 414(a) provides that, under regulations to be promulgated by the Treasury, service with a *predecessor* employer must be taken into account under some circumstances, there is no similar statutory provision that would require *successor* employer service ever to be taken into account. Further, it has been held that even predecessor service does not have to be taken into account for the qualification rules, absent promulgation of the contemplated regulations required under Code § 414(a). *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470-71 (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107A S. Ct. 1893 (1987).

REA were extended to the Employees they would receive nothing more than what they have already received.[5]

II. CONTINGENT LIABILITIES.

Mead fully agrees that under Code § 401(a)(2) all liabilities of a qualified pension plan must be satisfied before any remaining assets may revert to the employer. The implementing Treasury regulations have long provided that this requires satisfaction of both "fixed and contingent" liabilities. Treas. Reg. § 1.401-2(b)(2). Partial satisfaction of a plan's conditions for an early retirement benefit, however, does not create a contingent liability. The Employees contend that it does, largely by pointing to a pre-ERISA regulation first promulgated under the Revenue Act of 1938. Employees' Brief at 18-19; AFL-CIO's Brief at 7; AARP's Brief at 7. This contention is without merit.

A. Treasury Regulation § 1.401-2(b)(2) and ERISA.

The example in the 1938 regulation, which was republished in 1956 as Treasury Regulation § 1.401-2(b)(2), states:

> For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute "liabilities" within the meaning of that term.

Employees and their amici liken themselves to the 700 employees in the example, but the comparison is inapt. This is because, when placed in its historical context, it is unlikely that the regulation example was intended to

[5] As the text shows, Congress expressly chose not to protect early retirement benefits in ERISA, and to provide only limited protection for them in REA. Given these deliberate choices, it would be impermissible for a federal court to fashion an inconsistent "common law" rule. *See Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986); *but cf.* AARP's Brief at 13-14.

apply to benefits that did not accrue ratably under the terms of a plan.

Before ERISA pension plans were seriously underfunded; terminations with surplus assets were extremely rare; and there were no statutory rules requiring accrual, vesting, or funding. Moreover, as the Conference Committee of the Congress enacting ERISA recognized, many pre-ERISA plans did not have accrual provisions, even for normal retirement benefits.[6] Thus, when the regulation refers to 700 employees who have only partially met the plan's service requirements to receive a monthly pension, in all likelihood it was establishing a rule for plans that provided for a method of accrual of that benefit based on years of service. That is, the regulation made it clear that, if a plan provided for ratable accrual of benefits based on years of service, those benefits ratably accrued were contingent liabilities that must be satisfied if the plan terminated.[7] Nothing in the

[6] The ERISA Conference Report explains the situation this way: "However, many plans now in existence have no accrued benefit formula for the past, thus making it impossible in these cases to determine what the employee is vested in. To deal with this situation, the conference substitute provides that the accrued benefit under a plan for years prior to the effective date of the vesting provisions for any participant is to be not less than the greater of (1) the accrued benefit under the provisions of the plan (as in effect from time to time), or (2) an accrued benefit which is not less than one-half of the benefit which would have accrued under one of the three back-loading tests [of Code § 411(b)]." H.R. Conf. Rep. No. 1280, at 275, III ERISA Leg. Hist. at 4542. *See* ERISA § 204(b)(1)(D). In other words, one of the important but little-noticed protections embodied in ERISA was a provision that not only required that the basic pension benefit be ratably accrued for all future years, but which also forced retroactive benefit accruals under plans that, before ERISA, had no accrual provisions.

[7] This is precisely how the IRS has explained the requirement that contingent liabilities must be paid in six separate revenue rulings spanning nearly twenty years: "Contingent liabilities are the benefit credits accrued up to the time of termination of the trust . . . ." Rev. Rul. 53-33, 1953-1 C.B. 267, 273. *Accord* Rev. Rul. 57-163, 1957-1 C.B. 128, 138, Part 3(b); Rev. Rul. 61-157, 1961-2 C.B. 67, 79, Part 3(d); Rev. Rul. 65-178, 1965-2 C.B. 94, 110, Part 3(d); Rev. Rul. 69-421, 1969-2 C.B. 59, 69, Part 3(d); Rev. Rul. 71-152, 1971-1 C.B. 126.

regulation, however, compels a conclusion that plans without such accrual provisions—such as the Mead Plan in relation to subsidized early retirement benefits—have nonetheless created contingent liabilities.

Whatever the meaning of Treasury Regulation 1.401-2(b)(2) in the pre-ERISA world, however, ERISA settled the matter by giving a uniform meaning to the term "accrued benefit." Under ERISA only the normal retirement benefit is required to accumulate more or less ratably during participation in a pension plan. *See* ERISA § 204(b); Code § 411(b). Under the anti-backloading rules of Code § 411(b), which require roughly ratable accrual, subsidized early retirement benefits are disregarded. Treas. Reg. § 1.411(b)-1(b)(2)(ii)(C). The fact that the anti-backloading rules apply to the normal, but not to a subsidized early, retirement benefit follows directly from the decision of the ERISA Congress that the "accrued benefit" does not include any subsidized early retirement benefits. *See supra* at 3-4.

As Mead's Brief points out (42-43), although the IRS created the "contingent liability" concept, it does not hold the view of that concept ascribed to it by the Employees, AARP, and the AFL-CIO. The IRS demonstrated that by issuing the favorable determination letter to Mead. That determination letter constituted a public ruling that, *inter alia*, at Plan termination all liabilities to the Employees had been satisfied and that the reversion to Mead was proper.[8] Because the IRS' favorable determination letter in this case is completely consistent with literally thousands of other determination letters covering thousands of other plan terminations on the issue of what "liabiliies" need to be paid out before surplus

[8] The determination letter is reprinted in Pet. App. at 30a-31a; it was issued April 29, 1986. The effect of the determination letter is explained in Mead's Brief at 43 n. 42.

assets can revert, there is no support for the Employees' position.

B. The Retirement Equity Act.

After July 31, 1984, the effective date of REA, a subsidized early retirement benefit as to which the participant has only partially fulfilled the age or service requirements may become a contingent liability of a plan when it is terminated—not in the sense that it must be paid, but in the sense that it must be provided for. This is what is explained in Revenue Ruling 85-6, 1985-1 C.B. 133 (reprinted in the Appendix to this brief at 6a-9a), which expands the contingent liability concept to take account of REA. Under this ruling a contingent liability for an early retirement benefit for which only part of the requirements have been satisfied can be met upon plan termination by purchase of a contingent annuity contract that will provide the additional benefit if and when the participant fully satisfies all plan requirements for earning it. If the requirements are never met, the subsidy is never paid. *See* Mead's Brief at 33 n. 27, 42-43.[9]

III. CATEGORY 6 BENEFITS.

Contrary to the holding of the court below and the Second Circuit in *Amato*, nothing in the legislative history of ERISA supports a conclusion that the "all other benefits under the plan" language of ERISA § 4044(a)(6) ("Category 6") created a right to receive benefits that had not been earned. Mead's Brief at 18-22. Nor is there any merit to the Employees' contention that because ERISA § 4044(a)(5) ("Category 5") allocates assets to "all other nonforfeitable benefits under the plan" and Code § 411(d)(3) requires that all benefits accrued become nonforfeitable at the time of plan termination, Category 6 must have been intended to require that assets be allocated to benefits above and beyond those that are nonforfeitable, whether before or after plan termination. Employees' Brief at 25-31.

[9] For these same reasons, the assertion in the AFL-CIO's Brief (at 8-9) that Revenue Ruling 86-48, 1986-1 C.B. 216, somehow defines termination liabilities to include unearned early retirement subsidies is wide of the mark. That ruling explains what assets must be transferred under Code § 414(*l*) when one defined benefit plan is spun off into two. In order to protect participants, the assets transferred must be at least as great as the present value of benefits on a termination basis. Citing Revenue Ruling 85-6, the ruling quite properly requires that after REA the assets transferred must cover the value of the participants' early retirement subsidies, even if they are not yet earned. A contrary requirement would mean that there would not necessarily be sufficient assets in the spunoff plans for participants who may later earn the subsidy before adequate contributions have been made following the transfer.

A. Nonforfeitable Benefits.[10]

The Employees are wrong when they state that benefits that become nonforfeitable upon plan termination are included in Category 5. ERISA § 3(19) defines the term "nonforfeitable" for purposes of Title I. In *Nachman Corp. v. PBGC*, 446 U.S. 359, 370-71 (1980), dealing with the meaning of "nonforfeitable benefit" for purposes of the benefit guarantee of ERISA § 4022(a), this Court recognized that the Title I definition was not necessarily applicable for Title IV purposes. Title IV as enacted in 1974 had no definition of "nonforfeitable benefit," but the language of ERISA § 4022(a) makes it clear that the nonforfeitable benefits that are guaranteed by the PBGC do not include benefits that vest upon plan termination under Code § 411(d)(3). *See* ERISA § 4022(a) ("[PBGC] shall guarantee . . . the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan). . . .").

Contemporaneously with the enactment of ERISA, the PBGC in 1975 promulgated regulations that used this

[10] "Nonforfeitable" is defined in ERISA § 3(19), and "nonforfeitable benefit" is defined in ERISA § 4001(a)(8) and by the PBGC in 29 C.F.R. §§ 2613.6 and 2618.2. Each of these provisions is reprinted in the Appendix to this brief at 10a-12a.

section 4022(a) concept of what benefits were nonforfeitable for all Title IV purposes—including the allocation of assets upon plan termination. *See* PBGC Reg. §§ 2613.6 [11] (defining "nonforfeitable" for purposes of guaranteed benefits) and 2618.12 [12] (defining "nonforfeitable" for purposes of allocation of assets). Under this PBGC definition, accrued benefits that vest only on plan termination are *not* nonforfeitable benefits that go into Category 5, but rather fall into Category 6, as "other benefits under the plan."

The difference between the Title I and Title IV concepts of nonforfeitable benefits was at the center of *Nachman*. Because that difference raised the spectre of continuing confusion over what benefits were guaranteed by the PBGC, in 1980 Congress amended Title IV to codify the core provision of the PBGC's definition. ERISA § 4001 (a)(8). A Senate report explained the need for the statutory definition:

> The Committee recognizes that some confusion has arisen because ERISA defines "nonforfeitable" in title I but not in title IV. The title I definition is explicitly limited to that title, however. "Nonforfeitable" was defined for purposes of title IV in a PBGC regulation (29 CFR 2605.6 [subsequently redesignated as 29 C.F.R. § 2613.6; *see* 46 Fed. Reg. 32,574 (June 24, 1981)]). By incorporating into the statute the language of the regulation which correctly states the meaning of "nonforfeitable" for title IV, the Committee intends to remove any possibility for confusion in the future.

[11] This regulation was originally adopted as PBGC Reg. § 2605.6, effective Sept. 22, 1975. 40 Fed. Reg. 43,510, 43,511.

[12] This regulation was originally proposed as PBGC Reg. § 2608.2 on Nov. 4, 1975, 40 Fed. Reg. 51,368, 51,370. It was adopted as an interim regulation on Nov. 3, 1976, 41 Fed. Reg. 48,481, and was adopted in final form as PBGC Reg. § 2618.2 on Jan. 28, 1981, 46 Fed. Reg. 9,485.

Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., Summary and Analysis of Consideration of S. 1076, The Multiemployer Pension Plan Amendments Act of 1980 ("MEPPAA") 34 (Comm. Print), *reprinted in* 288 Pens. Rep. R. 3, R. 11 (BNA) (Apr. 28, 1980). Congress' limited purpose in adding ERISA § 4001(a)(8) was to codify that portion of the PBGC's regulation that was at issue in *Nachman*. *See* 446 U.S. at 373. Subparts (b), (c), (d), and (e) of that regulation, dealing with more specific matters such as benefits that vest upon plan termination, benefits that cease upon the remarriage of a spouse, and disability benefits that cease when the participant recovers, were not included in the statute. By codifying only the core concept of the PBGC regulation, Congress was not rejecting those subsidiary rules. Indeed, they remain part of the final regulation today. *See* 29 C.F.R. § 2613.6 (1987). The PBGC's definition of "nonforfeitable benefit" for purposes of the asset allocation rules of ERISA § 4044 (a) also includes the subsidiary rule that benefits that vest upon plan termination are not "nonforfeitable." This too is not inconsistent with the core definitional concept, which alone was put into the statute. *See* 29 C.F.R. § 2618.2.[13]

B. Deference to the PBGC's Interpretation.

In the complex and highly technical area of ERISA, considerable deference should be given to the PBGC's long-standing definition, which was promulgated contemporaneously with the enactment of ERISA and has since been applied consistently to thousands of plan terminations.[14] In *Nachman* this Court accepted the PBGC's

[13] Although this regulation has been amended in unrelated ways since the PBGC's definition was codified in MEPPAA, *see* 46 Fed. Reg. 32,575 (June 24, 1981); 46 Fed. Reg. 49,845 (Oct. 8, 1981), the subsidiary rule relegating benefits that vest on plan termination to Category 6 continues in force and without change.

[14] The Employees and their amici argue that the PBGC's interpretations of Categories 5 and 6 are wrong and entitled to little deference. Employees' Brief at 33; AFL-CIO's Brief at 17 n. 12; AARP's

definition of nonforfeitable benefits guaranteed under Title IV, stating:

> The PBGC has promulgated regulations containing a completely unambiguous definition of the term [nonforfeitable][18] and has been paying benefits to over 12,000 participants in terminated plans on the basis of this understanding of its statutory responsibilities. We surely may not reject this contemporary construction of the statute by the PBGC without a careful examination of Title IV and its underlying legislative history . . . .

446 U.S. at 373-74 & n. 18.

C. Legislative History and Policy.

The PBGC's definition of nonforfeitable benefits has support in the legislative history of ERISA. The Conference Report on ERISA described Category 5 as being limited to "all other (meaning uninsured) *vested* benefits." H.R. Conf. Rep. No. 1280, at 375, III ERISA Leg. Hist. at 4642 (emphasis added). Since accrued benefits that are forfeitable at the time of plan termination cannot aptly be described as "vested" benefits, they must fall into Category 6, not into Category 5. Because benefits that vest on plan termination fall into Category 6,

Brief at 12. Mead has argued that the language, structure, and legislative history of ERISA § 4044(a) reveal that Congress' clear intent was to enact an allocation scheme designed primarily to protect the federal insurance system and not to create substantive rights to benefit expectations not otherwise required under ERISA or provided under the terms of a plan. Mead's Brief at 14-18. If this Court agrees, that ends the matter. However, if this Court determines that Congress' intent is not clear, and that the statute is silent or ambiguous concerning the meaning of Categories 5 and 6, it is necessary then to decide whether the agency's interpretation is reasonable and based on a permissible construction of the statute. If it is, the Court will give deference to the agency's interpretation. *K Mart Corp. v. Cartier, Inc.*, —— U.S. ——, ——, 108A S. Ct. 1811, 1817-18 (1988); *NLRB v. United Food & Commercial Workers Union*, —— U.S. ——, ——, 108 S. Ct. 413, 421 & n. 20 (1987); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 865-66 (1984); *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984).

any interpretation of Category 6 that would require that it include unearned benefits would also require that such unearned benefits compete with the accrued benefits of participants that had been earned but had not vested until plan termination. Mead's Brief at 17-18. The Eleventh Circuit agrees. *Blessitt v. Retirement Plan for Dixie Engine Co.*, 848 F.2d 1164, 1177-78 (11th Cir. 1988) (en banc) (ranking benefits vested under the terms of a plan in Category 5 ahead of benefits that vest upon plan termination in Category 6 "comports with common sense notions of equity and fairness.").

D. The Court of Appeals' Construction of Category 6 and Legislative History.

The court below did not disagree with the PBGC's placement of benefits which vest upon plan termination in Category 6. Rather, the Fourth Circuit, following *Amato*, dramatically expanded Category 6 by holding that it creates liability for employees' "benefit expectations." Pet. App. at 1a-8a. This holding rests solely upon a truncated analysis of the legislative history of ERISA. As was made clear in Mead's Brief (at 18-21), the legislative history instead strongly suggests that the "all other benefits" language was employed because it was suitable for a catch-all final category that included not only accrued benefits that vest upon plan termination but also other plan-provided benefits that become payable only at termination.[15]

[15] *See also* Administration and congressional staff comments and recommendations on House and Senate versions of asset allocation provisions. III ERISA Leg. Hist. at 5105-07 (Administration), 5224-26 (congressional staff). There is not a shred of evidence in ERISA's legislative history to support the Employees' contentions (1) that the word "accrued" was once part of some predecessor bill's catch-all subsection that later became Category 6, or (2) that the word was deleted as a tradeoff for Senate acceptance of the House position excluding subsidized early retirement benefits from "accrued benefits".

IV. THE OTHER CONTENTIONS OF THE EMPLOYEES AND THEIR AMICI.[16]

A. Funding and Liability for Benefits.

One of the great reforms embodied in ERISA was to require that defined benefit plan promises be funded. ERISA § 302; Code § 412. Not only is the employer obligated to fund a defined benefit plan, but the risk that the plan assets may be insufficient to pay benefits as they become due under an ongoing plan falls on the employer. *See* Mead's Brief at 3.

Through a bald assertion that turns this fundamental truth about ERISA on its head, the AFL-CIO appears to argue that any benefit in a defined benefit plan that has been funded must be paid. AFL-CIO's Brief at 9-13. The logical extension of this argument is that benefits that have not been funded need never be paid. If that were true, there would have been no need to create the PBGC to guarantee the payment of benefits when plans terminate with insufficient assets, nor would a reversion to employers be possible until all possible benefit expectations under a plan had been paid, a result that has been repeatedly rejected by Congress. *See* Mead's Brief at 21-24.

Although the funding rules of ERISA draw heavily upon the arcane art and science of the actuary, their

[16] Contrary to the Employees' claim (at 20-21), no changes were made in the eligibility and benefit provisions of the Plan in this case. Accordingly, nothing in the briefs of the Employees or their amici weakens the conclusion that the assets remaining in the Mead Plan constituted surplus due to "actuarial error." Mead's Brief at 44-45. *Accord Blessitt*, 848 F.2d at 1170; *Bryant v. Int'l Fruit Products Co.*, 604 F. Supp. 890, 892-93 (S.D. Ohio 1985), *aff'd*, 793 F.2d 118 (6th Cir. 1986); Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Assets to the Employer*, 5 Am. J. of Tax Policy 117, 129 n. 51 (1986) ("The meaning of actuarial error includes the actuary's mistaken view that the employer will continue the plan."). *But cf. Van Orman v. Fireman's Fund Ins. Co.*, No. 75-2007, slip op. (D.N.J. Oct. 23, 1980), *aff'd in part and rev'd in part on other grounds*, 680 F.2d 301 (3d Cir. 1982) (employees had contributed to plan).

basic thrust is simple. Pension plans contain a pool of assets that are accumulated to pay any or all benefit liabilities owed to any and all participants. The funding rules aim to ensure that, in the aggregate, there will always be enough assets to meet benefit claims. However, no specific assets are set aside for individuals, and no participant has a claim against any particular assets. In funding a plan for projected benefits as well as those already earned, an actuary discounts possible future liabilities using turnover and mortality assumptions—that is, the actuary reduces the required annual contributions to take into account the probability that participants may leave or die before earning their benefits. Indeed, if an employee leaves one year short of full vesting under a cliff-vested plan, he or she receives nothing, even though benefits may have been accrued and funded for that employee during each year of participation. In short, although there is symmetry and correlation between the way in which aggregate benefits accumulate and are funded in a pension plan, there is no necessary connection between funding and liability for any individual. The fact that projected benefits are funded in advance does not mean that they will be earned, and a plan has no liability to pay benefits unless and until they are earned.

B. The Pension Protection Act of 1987.

Although Code § 401(a)(2) has long provided that there can be no reversion to an employer until all plan liabilities have been satisfied, there was no rule prior to 1987 preventing termination of a plan without payment of all liabilities. The innovation introduced by the Pension Protection Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, is to prohibit, after December 17, 1987, a standard termination of a defined benefit plan unless it has sufficient assets to pay all "benefit liabilities" under a plan—*i.e.*, all liabilities within the meaning of Code § 401(a)(2). *See* ERISA §§ 4041(b)(1)(D), 4001(a)(16). In other words, employers must now fund and pay

all of the benefits that have been promised and earned under the plan.[17]

The AFL-CIO urges that the Pension Protection Act of 1987 somehow proves that the PBGC's 15-year-old position that Category 6 contains only accrued benefits that vest upon plan termination is wrong. AFL-CIO's Brief at 17 & n. 12. This claim strains credulity. Current PBGC regulations do not yet reflect the prospective changes made by the Pension Protection Act. When they are revised to do so, they may well either (1) clarify that among the "other benefits under the plan" that now fall into Category 6 are additional benefits that must now be paid under the Pension Protection Act in a standard termination, or (2) rank such benefits below Category 6 by providing that they are liabilities that must now be satisfied under ERISA § 4044(d)(1) before there can be a reversion to the employer.

Not only does the AFL-CIO gloss over the fact that the Pension Protection Act is inapplicable by its terms to this case, it also ignores the part of the Pension Protection Act Conference Report that makes it indelibly clear that early retirement subsidies are not earned ratably over time but all at once, when and if all of the plan's criteria are satisfied. H.R. Conf. Rep. No. 495 at 856, 2313-1602. Under the limitation placed on the extent to which projected benefits may be funded, and the

[17] Mead has no quarrel with the portion of the Conference Report on the Pension Protection Act of 1987 quoted in the AFL-CIO's Brief at 17, but that language can give no comfort to the Employees. As the Conference Report makes clear, there are often benefits under a pension plan that have been earned but are not protected as part of the accrued benefit or under the anti-cutback rule of Code § 411(d)(6), such as disability pensions and plant shutdown benefits. In the past these benefits might be lost forever if a plan were terminated without sufficient assets to pay them. However, a plan may not now terminate without assets sufficient to pay such benefits "that are not protected by Section 411(d)(6) of the Code or Section 204(g) of ERISA." H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 499, 879, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1625.

employer's contributions therefore deducted, the Pension Protection Act *requires* that a plan use reasonable turnover and mortality factors in determining the funding of early retirement subsidies. The statute accordingly restricts funding such benefits for employees who die or leave before meeting all of the plan's criteria and, consequently, will never receive any portion of the subsidy. *Id.* Thus, the Pension Protection Act of 1987 serves only to confirm Mead's position.

C. Damages.

In addition to misstating facts concerning the damages issue,[18] the Employees fail to address the dispositive question: whether it was an abuse of discretion for the court below to reach and decide an issue not addressed or decided by the district court. The reason is obvious—in the court of appeals the Employees conceded that damages had not been reached by the district court and that they were not in issue on appeal. *See* Appendix to Mead's Brief at 12-13. Moreover, the Employees have offered no support for the existence of either "exceptional circumstance" identified in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), as justifying an appellate decision of an issue not first addressed by the trial court. Accordingly, the court below abused its discretion and should be reversed on the issue of damages.

[18] The Employees assert (at 35) that Mead stated that the Employees' damages chart appeared for the first time in the Fourth Circuit. *But see* Mead's Brief at 47 & n. 45. The Employees also state (at 35) that they argued damages in the Fourth Circuit. Although the Employees appended their "chart" to their initial brief, they neither raised damages as an issue on appeal per Fed. R. App. P. 28(a)(2) (*see* Appellants' Fourth Circuit Brief at 6), nor argued damages in that brief.

D. Valid Expectations.

If the decision below is affirmed no employer can have any confidence that the plan benefit provisions it has chosen or negotiated will not be voided in a lawsuit by a participant who almost satisfied the plan's eligibility criteria. AARP states that the ability to rely on the terms of pension plans is "essential" to employees. AARP's Brief at 2. Employers have the same "essential" reliance interests, for they must fund pension plans and assure that participants' benefits are paid out in strict accord with plan terms.[19] In this case, it is undeniably true that the Plan contained clear requirements that had to be met in order to earn the early retirement subsidy. To erase such requirements for employees who fall three years short is to erase them for employees who fall short by 30 years.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

[19] In a different context, one of the authors of the AFL-CIO's Brief put the point even more forcefully: "[T]he legitimacy of the employees' expectations depends upon the terms of the employer's promise. Many, if not most, pre-ERISA plans specifically reserved the right to terminate . . . . Even those courts which (properly, in my view) held that pension plans were not mere gratuities but constituted enforceable promises would not, except in unusual circumstances, have held the employer to a promise he expressly and unambiguously disclaimed. An employer may cogently argue that his expectation when he set up the plan that he could terminate without liability, grounded as it was in plan provisions and established legal principles, is more entitled to be respected than an employee's expectation that the employer would provide a pension." Driesen, *Reforming the Pension Reform Act: Employer Liability*, 3 J. Pension Planning & Compliance 337, 343 (1977) (footnotes omitted).

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 84-7978

FRANK J. AMATO, *et al.*,
Plaintiffs-Appellants

v.

WESTERN UNION INTERNATIONAL, INC., *et al.*,
Defendants-Appellees

On Appeal from the Judgment of the United States District Court for the Southern District of New York

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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* * * *

ARGUMENT

IT IS THE POSITION OF THE INTERNAL REVENUE SERVICE THAT AN UNREDUCED EARLY RETIREMENT BENEFIT IS AN "ACCRUED BENEFIT" WITHIN THE MEANING OF SECTION 411 OF THE INTERNAL REVENUE CODE AND, AS SUCH, MAY NOT BE DECREASED BY AN AMENDMENT TO THE PLAN

The Employee Retirement Plan Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829, Sec-

tion 1012(a), added Section 411 to the Internal Revenue Code of 1954. Section 411 sets forth certain minimum vesting standards that must be satisfied in order for a plan to be a "qualified" plan under Section 401 of the Code. These vesting standards must be satisfied with respect to the "accrued benefit" provided employees under the plan as that term is used in Section 411. In this regard, Section 411(d)(6) provides, with an exception not pertinent here, that a plan amendment that decreases the "accrued benefit" of a participant renders the plan in violation of Section 411.

As indicated, the vesting standards specified in Section 411 do not apply to every benefit provided under a plan, but, rather, these standards need be satisfied only as to the "accrued benefit" provided to the participants of the plan. See H. Rep. No. 93-807, 93d Cong., 2d Sess., at 60 (1974-3 Cum. Bull. Supp. 236, 295). The dispute between the parties in the instant case is centered on the question whether a plan provision allowing a participant, meeting certain specified age and length of service requirements, to retire prior to normal retirement age without any reduction in his annual benefit (*i.e.* a full early retirement benefit) is an "accrued benefit" within the meaning of Section 411. The District Court, rejecting the position of the plaintiffs, answered this question in the negative. The Internal Revenue Service, however, as the agency charged with the responsibiilty of enforcing the tax provisions of ERISA, has made an administrative determination that a full, *i.e.*, unreduced, early retirement benefit is an "accrued benefit" subject to the protections of Section 411 and the purpose of this brief is advice [sic] the Court of that determination.

In all candor, we would advise the Court that no definitive answer to the question whether a full early retirement benefit is an accrued benefit within the meaning of Section 411 is provided by the terms of that statute or its legislative history. Although there are brief com-

ments in the legislative history that seem to indicate that Congress did not intend to include an early retirement benefit within the term accrued benefit,[2] these comments simply are too cryptic to establish whether Congress intended to permit amendment of plans to eliminate such benefits retroactively, even as to those participants who were on the verge of satisfying the conditions necessary to qualify for the benefit.

Further doubt that Congress adopted such a laissez-faire attitude toward an early retirement benefit arises out of the subsequent enactment of the Retirement Equity Act, P.L. 98-397 (Aug. 23, 1984). This Act amended the Internal Revenue Code so as expressly to treat an early retirement benefit as an accrued benefit subject to the protections of Section 411. Although these new provisions are effective only as to plan amendments adopted after July 30, 1984, the legislative history of the Act suggests that Congress viewed the new provision as merely a codification of existing law. Indeed, the report of the Committee on Ways and Means (H. Rep. No. 98-655, Part 2, 98th Cong., 2d Sess. at 25-26) expressly states that the new provisions according protection to early retirement benefits is [sic] a codification of present law.[3]

The Internal Revenue Service (IRS), taking into account that the overriding goal of ERISA is the protection of employees' pension benefits, has determined that an early retirement benefit is an accrued benefit within the

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[2] See H. Rep. No. 93-807, *supra*, at 60 (1974-3 Cum. Bull. Supp. at 295); H. Conf. Rep. 93-1280, 93d Cong., 2d Sess. at 273, (1974-3 Cum. Bull. 415, 434).

[3] The report of the Senate Finance Committee (S. Rep. No. 98-575, 98th Cong., 2d Sess. at 28) states that the Act clarifies the scope of the prohibition against decreases in an accrued benefit but that the Committee intends that no inference is to be made on the basis of such clarification as to the scope of the prohibition before the effective date of the new provisions.

meaning of Section 411. The IRS is of view [sic] that a reduction or decrease in an early retirement benefit that is given retroactive application violates Section 411(d)(6) of the Code and Treasury Regulation 1.411(d)-3(b).[4] In accordance with this position, the IRS, on February 15, 1985, notified defendant Western Union International, Inc. that it had made a proposed determination that the Western Union Pension Plan does not meet the requirements of Section 401 of the Code, because the November 19, 1982, amendment, eliminating the eligibility of participants for the unreduced early retirement benefit provided in the Plan prior to the adoption of the amendment, constitutes a reduction in an accrued benefit in violation of Section 411(d)(6) of the Code.[5]

This administrative determination, of course, is not controlling on the Court. Nevertheless, given the broad authority that Congress has conferred on the IRS to enforce the tax provisions of ERISA and thereby to achieve the protection of pension benefits that is at the heart of that Act, administrative determinations of the

[4] Section 1.411(d)-3(b) of the Regulations provides that "plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, *and to actuarial factors for determining optional or early retirement benefits*." (Emphasis added.) The IRS takes the position that a plan amendment which eliminates unreduced early retirement benefits, such as the amendment in question here, involves a change in the plan's actuarial factors that impermissibly affects accrued benefits. Cf. Rev. Rul. 81-12, 1981-1 Cum. Bull. 228.

[5] The February 15, 1985 notice advised Western Union of its right (within 30 days) to appeal the proposed determination to the appropriate regional office of the IRS and further advised it that a final adverse determination letter would be issued if the corporation did not file an appeal within the alloted 30-day prevail [sic]. Western Union also was advised that if it did not pursue an appeal to the regional office it likely would be precluded from seeking declaratory relief from the Tax Court under Section 7476 of the Code for failure to exhaust its administrative remedies. See Section 7476(b)(3).

IRS in this area should be accorded substantial weight and not be disregarded lightly. Cf. *Cornell-Young Co.* v. *United States*, 469 F. 2d 1318, 1323 (5th Cir. 1972); *Container Service Co.* v. *United States*, 478 F. 2d 770 (6th Cir. 1973). See also, *United States* v. *Correll*, 389 U.S. 299 (1967). The determination of the IRS here that an early retirement benefit is an accrued benefit within the meaning of Section 411 is both reasonable and fully consistent with the policy considerations underlying the enactment of ERISA.

CONCLUSION

The judgment of the District Court should be reversed and the case remanded for further proceedings.

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[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

Rev. Rul. 85-6, 1985-1 C.B. 133

PURPOSE

The purpose of this revenue ruling is to consider Rev. Rul. 83-52, 1983-1 C.B. 87, in light of the enactment of section 301 of the Retirement Equity Act of 1984 (REA), Pub. L. 98-397, 1984-2 C.B. 433.

ISSUES

Will the return of the amount of plan assets determined as described below to an employer upon the termination of a qualified defined benefit plan meet the nondiversion and vesting requirements of sections 401 (a) (2) and 411 of the Internal Revenue Code?

FACTS

A qualified defined benefit plan that is not a multiemployer plan described in section 414(f) of the Code provides that a participant who retires prior to the normal retirement age of 65, but after attaining age 55 and completing 30 years of service, is entitled to the immediate commencement of the participant's accrued benefit without any actuarial reduction. The plan also provides that upon termination the amount by which the value of plan assets exceeds the present value of all participants' benefits (whether or not nonforfeitable) on a termination basis will revert to the employer maintaining the plan.

The employer who maintains the plan proposes to terminate the plan after the effective date of section 301 of REA with respect to the plan and distribute cash and annuity contracts equal to the present value of the participants' benefits. Under the proposal, unless a participant has attained age 55 and completed 30 years of service at the time of the proposed termination, such present value will not include the value of the subsidy that had been provided with respect to the early retirement benefit. Thus, participants who do not satisfy the minimum

age and service requirements at the time of the proposed termination, but who subsequently satisfy these conditions, will not receive the subsidized benefit.

At the time of the proposed termination, the value of the plan assets will exceed the present value of the participants' benefits determined in this manner.

LAW AND ANALYSIS

Section 401(a) (2) of the Code and section 1.401-2 of the Income Tax Regulations provide that plan funds must not be used for purposes other than the exclusive benefit of employees or their beneficiaries prior to the termination of the plan and the satisfaction of all liabilities with respect to those individuals. Section 1.401-2 (b) (2) provides that the liabilities that must be satisfied include both fixed (those nonforfeitable prior to termination) and contingent (those not nonforfeitable prior to termination) liabilities. After satisfaction of those liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error.

Rev. Rul. 83-52 provides guidance on the determination of the amount that may be returned to an employer upon the termination of a defined benefit plan in accordance with the nondiversion requirement of section 401(a) (2) of the Code.

Section 411(d) (6) (B) of the Code provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or of eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing the accrued benefit of a participant for purposes of section 411(d) (6) (A). Under section 411(d) (6) (A) such a decrease in accrued benefits results in the plan not satisfying section 411. However, section 411(d) (6) (B) provides that, in the case of a retirement-type subsidy, this prohibition ap-

plies only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The REA amendments to section 411(d)(6) described above apply generally to plan amendments made after July 30, 1984.

The explanation of REA in S. Rep. No. 98-575, 98th Cong., 2nd Sess. 31 (1984) provides:

> The bill does not provide an exception to the prohibition against reduction of benefits or elimination of benefit options in the case of a terminated plan. Accordingly, a plan is not to be considered to have satisfied all of its liabilities to participants and beneficiaries until it has provided for the payment of contingent liabilities with respect to a participant who, after the date of the termination of a plan, meets the requirements for a subsidized benefit.

The right of a participant under the plan to immediate payment without actuarial reduction, if age 55 with 30 years of service, is both a retirement-type subsidy subject to section 411(d)(6)(B) of the Code and a liability for purposes of section 401(a)(2). A participant could, after the date of the proposed termination, satisfy the pretermination conditions necessary to receive this retirement-type subsidy. Accordingly, the proposed termination eliminating this accrued retirement-type subsidy would result in the plan failing to satisfy the vesting requirements of section 411. Further, all liabilities will not be satisfied for purposes of section 401(a)(2) if the value of this retirement-type subsidy is not provided with respect to a participant who, after the date of the proposed termination, satisfies the pretermination conditions necessary to receive such benefit. Until the liabilities for these benefits are satisfied, the employer may not recover any remaining funds as surplus resulting from actuarial error without disqualifying the plan.

In this case, there are at least two ways in which the vesting requirements could be met, the liabilities could

be satisfied, and the employer could recover any surplus. First, annuity contracts may be purchased from an insurance company that provides for the retirement-type subsidy in the event any participant, subsequent to plan termination satisfies the pretermination conditions of age 55 with 30 years of service necessary to receive the subsidized benefits. Second, the plan on termination may be amended to provide such subsidized benefits whether or not participants subsequently satisfy the necessary conditions. In order for the plan to remain qualified, such an increase in benefits must satisfy other Code requirements, be provided in a nondiscriminatory manner, and be distributed in a manner that is permitted with respect to an individual who has satisfied the conditions necessary for such subsidized benefits.

HOLDING

The return of the amount of plan assets determined as proposed above to the employer upon the termination of the qualified defined benefit plan will not meet the nondiversion and vesting requirements of sections 401(a)(2) and 411 of the Code.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 83-52 is modified and superseded.

ERISA § 3(19); 29 U.S.C. § 1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forefitable merely because the plan contains a provision described in section 203(a)(3)

ERISA § 4001(a)(8); 29 U.S.C. § 1301(a)(8)

"(8) 'nonforfeitable benefit' means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this Act or the Internal Revenue Code of 1954;

29 C.F.R. § 2613.6 (1987)

§ 2613.6 Determination of nonforfeitable benefits.

(a) For the purposes of this part, a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.

(b) For the purposes of this part, benefits that become nonforfeitable solely as a result of the termination of a plan will be considered forfeitable.

(c) A guaranteed benefit payable to a surviving beneficiary is not considered to be forfeitable solely because the plan provides that the benefit will cease upon the remarriage of such beneficiary or his attaining a specified age. However, the PBGC will observe the provisions of the plan relating to the effect of such remarriage or attainment of such specified age on the surviving beneficiary's eligibility to continue to receive benefit payments.

(d) Any other provision in a plan that the right to a benefit in pay status will cease or be suspended upon the occurrence of any specified condition does not automatically make that benefit forfeitable. In each such case the PBGC will determine whether the benefit is forfeitable.

(e) A benefit guaranteed under § 2613.7 shall not be considered forfeitable solely because the plan provides that upon recovery of the participant the benefits will cease.

[40 FR 43510, Sept. 22, 1975), as amended at 45 FR 14011, Apr. 4, 1978. Redesignated at FR 32575, June 24, 1981]

29 C.F.R. § 2618.2 (1987)

§ 2618.2 Definitions.

For purposes of this part:

. . . .

"Nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of the Act (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a partici-

pant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of the Act or the Code. Benefits that become nonforfeitable solely as a result of the termination of a plan will be considered forfeitable.

AMICUS CURIAE

BRIEF

13

NO. 87-1868

IN THE

Supreme Court of the United States

October Term, 1988

THE MEAD CORPORATION,

Petitioner

v.

B.E. TILLEY, *et al.*,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Academy of Actuaries submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Petitioner in No. 87-1868, having obtained the written consent of both the Petitioner and the Respondents to file same. A copy of said written consent is attached as Appendix 1 to this brief.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The American Academy of Actuaries (the "Academy") is a national professional organization of actuaries which was formed in 1965 to bring into one organization actuaries of all specialties within the United States. Its main focus is the social, economic, and public policy environment in which the actuarial profession functions. Primary activities include the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice.

Actuaries are an indispensable element in the functioning of pension plans, particularly in areas of plan design, administration, and financing. Actuaries must satisfy regulatory requirements propounded by the Joint Board for the Enrollment of Actuaries, pursuant to Section 3042 of the Employee Retirement Income Security Act ("ERISA") in order to engage in practice pursuant to that statute (to become "enrolled actuaries"). More than 85% of all enrolled actuaries are represented within the Academy's membership.

Enrolled actuaries are authorized to make annual certifications required by Section 103(a)(4) of ERISA and, most importantly for the instant matter, to certify the minimum funding level of defined benefit pension plans under Section 302 of ERISA.

The Academy is deeply concerned about the effect of the Fourth Circuit's decision below upon defined benefit plans, upon the pension system as a whole, and upon the actuarial profession's ability to undertake its responsibilities under law. Because of the importance of clarifying the role of actuaries in future pension plan administration, the Academy respectfully prays that a decision be entered in favor of Petitioner, The Mead Corporation ("Mead" herein).

II. STATEMENT OF THE ISSUE

Whether upon termination of a defined benefit pension plan, early retirement benefits that have not accrued because the age and service conditions defined in the plan have not been met must, nevertheless, be paid to plan participants pursuant to 29 U.S.C. 1344(a)(6) before excess plan assets can revert to the plan sponsor.

III. STATEMENT OF THE CASE

Amicus adopts the statement of the case as set forth by Petitioner.

IV. ARGUMENT

A. The Academy presented this Court a brief in support of Mead's Petition for Certiorari. The Academy respectfully here reasserts the arguments contained in that brief, as they continue to constitute appropriate bases for decision in this matter.

B. The Fourth Circuit, in its decision below, held that the employees were entitled to the contested early retirement benefits at issue, and then held that the correct calculation of those benefits "should be determined by figuring the actuarial reduction of five percent per year from the early retirement age of the [employee], rather than from age sixty-five." 815 F.2d at 992, Pet. App. 7a. The determination of an appropriate amount of damages in a case such as this is a highly complex actuarial matter, which was not briefed nor argued extensively by the parties below. Therefore, should this Court enter judgment in favor of Respondents, it is respectfully suggested that the issue of damages be remanded for further consideration.

V. CONCLUSION

The Academy respectfully requests that this Court enter judgment in favor of Petitioner Mead Corporation for the reasons set forth above.

Respectfully submitted,

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November 8, 1988

The Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Mead Corporation v.
B. E. Tilley, et al.
No. 87-1868

Dear Mr. Spaniol:

Pursuant to Supreme Court Rule 36.2, all parties to this case hereby consent to the filing of amicus curiae briefs by the following interested organizations in support of Petitioner, The Mead Corporation ("Mead"): (1) The Pension Benefit Guaranty Corporation; (2) The American Society of Pension Actuaries; (3) The American Academy of Actuaries; (4) The American Paper Institute, Inc.; (5) The Chamber of Commerce of the United States; (6) The National Employee Benefits Institute; and (7) The Association of Private Pension Welfare Plans.

Counsel for Respondents does not know at this time whether any amici intend to file briefs in support of Respondents. The parties will furnish a second consent letter enumerating such amici at a later date.

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AMICUS CURIAE

BRIEF

(13)

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THE MEAD CORPORATION,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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18 pp

Questions Presented For Review

1) Whether benefits not earned under the terms of a defined benefit plan must be paid to participants under Section 4044 of the Employee Retirement and Income Security Act of 1974 (ERISA) before surplus assets may revert to the employer upon termination of a single employer defined benefit plan.

2) Whether the Fourth Circuit erred with respect to the methodology for computing the additional unearned benefits granted to the employees.

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The American Society of Pension Actuaries submits this brief, amicus curiae, pursuant to Rule 36 of the Rules of the Supreme Court of the United States in support of the petitioner. Counsel for the parties in this case have given written consent to the filing of this amicus curiae brief.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 815 F.2d 989.

JURISDICTION

The Judgement of the Court of Appeals for the Fourth Circuit Court was entered on April 9, 1987. A timely petition for rehearing was denied by the Fourth Circuit on February 17, 1988. The petition for a writ of certiorari was filed on May 16, 1988, and was granted on October 3, 1988.

STATEMENT OF THE CASE

The Plaintiffs (employees) in this case were participants in a defined benefit plan which terminated in 1983 without providing early retirement benefits to the Plaintiffs. Plaintiffs filed a Complaint against the Defendant (employer) asserting that the Defendant denied early retirement benefits due Plaintiffs upon plan termination. On Motions and Cross-Motions for Summary Judgment, the district court granted Defendant's Motion for Summary Judgment holding that Plaintiffs were not entitled to early retirement benefits because they had not satisfied the conditions for early retirement at the time the plan was terminated. Plaintiffs appealed and a panel of the Fourth Circuit Court of Appeals reversed the district court in a decision issued on April 9, 1987. The Fourth Circuit held that under Section 4044 of ERISA, 29 U.S.C. Section 1344(a)(6), the Defendant was required to pay early retirement benefits to the Plaintiffs, even though the Plaintiffs had not satisfied the conditions for entitlement to such benefits, before the Defendant was allowed to receive any residual assets resulting from actuarial error. The Fourth Circuit required the calculation of the lump sum benefits payable to the Plaintiffs to be based upon their benefits payable at early retirement age. The Defendant then filed its Petition for Rehearing and Suggestion for Rehearing en banc, which was denied. The Defendant then filed a writ of certiorari, which was granted by this Court.

INTEREST OF AMICUS

The American Society of Pension Actuaries (ASPA) is a nonprofit organization whose membership consists of more than 2500 persons who provide actuarial, consulting and administrative services to approximately 30 percent of the qualified retirement plans in the United States.

One of ASPA's primary purposes is the preservation and enhancement of the private pension system in the United States. It is our view that the decision of the Fourth Circuit Court of Appeals in the case of *Tilley v. Mead Corp.*, 815 F.2d 989(1987) (hereinafter, *Tilley*) will have a significant adverse effect on single-employer defined benefit plans, which is the type of plan to which *Tilley* applies.

Single employer defined benefit plans constitute the type of plan from which most of our citizens who are participants in the private pension system will derive their benefits. The assets in these plans also play a vital role in providing investment capital to our economy. Any factor that would significantly impact on these plans in a negative way would obviously have devastating results. For the reasons described below, we believe *Tilley* will have such a significant negative impact.

Tilley, in concluding that ERISA Section 4044(a)(6) refers to unaccrued early retirement benefits, is contrary to the long-established understanding and practice of the professional pension community and will make it difficult for pension administrators and actuaries to complete plan terminations. Most plans include early retirement benefits of some kind. Prior to 1984, it would have been very unusual that a plan made a provision for the payment of early retirement benefits to participants who did not satisfy the conditions for those benefits as of the date of plan termination. Since then, in compliance with the Retirement Equity Act of 1984, plans have provided

for the payment of early retirement benefits to participants who actually meet the conditions for entitlement after the date of termination.[1]

Furthermore, the reasoning in *Tilley* is capable of being vastly expanded to benefits other than early retirement benefits, as occurred in the *Blessitt case. Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *rehearing en banc granted,* 836 F.2d 1571 (11th Cir. 1988), *reversed en banc* 848 F.2d 1164 (11th Cir. 1988). Because of conflict between Tilley and well-established administrative agencies' rules and interpretations governing the distribution of assets upon termination of a pension plan, pension actuaries and administrators are placed in a quandary with regard to how to process plan terminations. Furthermore, Tilley will call into question past terminations and reversions. In a report dated December 15, 1987, to the Chairman of the United States Senate Special Committee on Aging, the PBGC reported that about 84,000 notices of single and multi-employer plan terminations had been received since the enactment of ERISA in 1974. In 1987 alone, the PBGC received termination notices for nearly 11,000 plans. The vast bulk of these notices relate to single employer defined benefit plans. In addition, there are many plans not insured by the PBGC which are subject to the requirements of Section 4044 which terminate each year. Consequently, if *Tilley* is not reversed, we

[1]Section 301(a) of the Retirement Equity Act of 1984 amended ERISA Section 204(g), 29 U.S.C. Section 1054(g), and Internal Revenue Code Section 411(d)(6), effective July 30, 1984, to require that plans that terminate on or after that date make provision for the payment of early retirement benefits to participants who actually meet the conditions for early retirement after termination. See also Rev. Rul. 85-6, 1985-1, C.B. 133. The plan in the *Tilley* case terminated prior to July 30, 1984. Furthermore, the Court in this case required payments to participants at the time of termination without regard to whether the conditions for early retirement are ever met.

anticipate that there will be a massive amount of litigation with respect to terminations that have already taken place.

It is our view that *Tilley* is legally incorrect and will cause serious damage to the single employer defined benefit system by creating significant uncertainty as to how to process plan terminations and by raising questions as to the legality of distributions to participants and reversions to employers under terminations that have already occurred. It will cause a major change in the funding approaches to single employer defined benefit plans, which will weaken employee benefit security. Furthermore, it will create doubts in the minds of employers as to the wisdom of being involved in a system wherein longstanding, well understood rules established by Congress, and clearly enunciated by the federal agencies having administrative responsibility, are suddenly overturned.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in concluding that Section 4044 of ERISA creates rights to benefits not earned under the terms of the plan. The employees involved in this case did not meet the conditions specified in the plan which would have entitled them to early retirement benefits, and therefore are not entitled to such benefits. The law clearly permits the reversion to the employer of assets in excess of those necessary to provide earned benefits upon the termination of the plan, and the plan provided for such a reversion. Consequently, the employer is entitled to the reversion of the full amount of plan assets in excess of those necessary to provide earned benefits.

ARGUMENT

A. The Fourth Circuit Erred In Interpreting Unaccrued Early Retirement Benefits as "Other Benefits" Under Section 4044(a)(6) Of ERISA

The Fourth Circuit, relying on dictum in *Amato v. Western Union International*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 106 S. Ct. 1167, 89 L. Ed. 2d 288 (1986), concluded that unaccrued early retirement benefits constituted "other benefits under the Plan" within the meaning of 29 U.S.C. Section 1344(a)(6) (ERISA Section 4044(a)(6)) and that such benefits must be considered in determining the value of an employee's benefit upon termination of the plan.

It is respectfully submitted that the Fourth Circuit erred in following the Amato case dictum by holding that the early retirement benefits were other benefits under Section 4044(a)(6) of ERISA.

A review of the legislative history[2] surrounding the passage of Section 4044 does not indicate that rights to benefits are created independent of the plan provisions. Rather such Section simply prioritizes the distribution of assets upon termination to protect certain classes of benefits in the event there are insufficient assets to satisfy all benefit entitlements.

The pertinent Section of 4044(a) provides in part:

> In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

[2]S. Rep. 93-383 at 84 (August 21, 1973) and Conf. Rep. 93-1280 at 376 (August 12, 1974).

> . . .
>
> (5) Fifth, to all other nonforfeitable benefits under the plan.
>
> (6) Sixth, to all other benefits under the plan.

In the *Amato* case, the Court based its dictum on the absence of the phrase "other accrued benefits" from Section 4044(a)(6) of ERISA (sometimes referred to as "Category 6 Benefits"). We believe this deletion in the final text did not reflect an intention to require a terminated plan to provide unaccrued benefits. Had the Conference Committee intended such a result, which would have been dramatically different than the House and Senate bills, and pre-ERISA law, it surely would have made specific reference to such an intent. No such reference can be found in the Conference Committee report. It should be noted that elsewhere the ERISA drafters specifically discussed areas, such as vesting, prohibited transactions, and salary reduction plans, where ERISA altered prior law or where the final statute differed from predecessor bills.

This failure to indicate specifically any intention to require a terminated plan to provide unaccrued benefits is particularly significant in view of the long-standing, clearly expressed Congressional intent to allow reversions of assets not needed to pay accrued benefits. Some recent legislative history is illustrative of this matter.

Congress has made certain very specific changes with respect to the conditions under which employers can obtain reversions of excess assets. Section 1132 of the Tax Reform Act of 1986, Public Law 99-514 (TRA '86), imposed a 10 percent excise tax on reversions from defined benefit plans, effective for reversions occurring after December 31, 1985, unless the plan termination date was before January 1, 1986.

Section 9311 of the Omnibus Budget Reconciliation Act of 1987, Public Law 100-203 (OBRA '87), provided that a plan amendment permitting a reversion will not become effective until the end of the fifth calendar year following its adoption, with an exception for a plan terminated within five years after its inception. Section 6069 of the Technical Corrections and Miscellaneous Revenue Act of 1988, H.R. 4333, signed by the President on November 11, 1988, increases the excise tax on reversions from 10 to 15 percent for reversions occurring on or after October 21, 1988, unless a notice of intent to terminate was provided to participants before October 21, 1988, for a plan subject to PBGC, or a notice of intent to reduce future accruals was provided to participants in connection with the termination prior to October 21, 1988, for a plan not subject to PBGC.

On the other hand, in formulating OBRA '87, Congress rejected a proposal of the House Education and Labor Committee and the Senate Labor and Human Resources Committee to amend ERISA Section 4044(d) to provide a "minimum benefit cushion" (up to 25 percent of assets first allocated under Section 4044(a)) which would have to be paid to participants before there could be a reversion to employers. Furthermore, various proposals to impose a moratorium on reversions were rejected by the 100th Congress, which just recently adjourned.

This legislative history clearly indicates that Congress has very carefully considered the reversion issue and has knowingly sanctioned the reversion to employers of assets not needed to pay accrued benefits upon plan termination.

B. The Fourth Circuit's Decision is Contrary to the Clear Intent of ERISA to Provide Adequate Funding in Defined Benefit Plans.

ERISA established minimum funding standards for defined benefit plans and prescribed a maximum number of years to amortize past service liability and experience gains and losses. ERISA also provides for the imposition of a 5 percent excise tax (which becomes 10 percent for plan years beginning in 1989) on the amount that should have been contributed to meet the minimum funding standards, but which the employer failed to contribute. (A 100 percent excise tax can be levied if the employer fails to correct a funding deficiency within a certain period of time.) Furthermore, ERISA created the category of "Enrolled Actuaries," individuals licensed and regulated by the Joint Board for the Enrollment of Actuaries, and requires that an Enrolled Actuary annually certify as to the status of the plan relative to the minimum funding standards.

The principle established by *Tilley* requires that surplus plan assets upon termination of a defined benefit plan be used to provide unaccrued benefits. As a result, employers will be disinclined to adopt conservative funding approaches (which produce higher funding levels) for defined benefit plans, fearing that any actuarial surplus that arises will be distributed to employees. An actuarial surplus develops, as in the instant case, because of actuarial error, which means that actual experience in investment or other areas proved more financially favorable then the projected experience utilized in the funding.

The principle established in *Tilley* is contrary to the clear intent of the funding provisions in ERISA, which are designed to insure that adequate funds will be available to pay promised benefits. In other words, *Tilley* will result in lower fun-

ding levels, and thus diminished employee benefit security, contrary to the intent of ERISA.

Some discussion of funding principles and actuarial cost methods and assumptions is appropriate here. ERISA provides that an employer must contribute enough each year to meet the minimum funding requirements for a defined benefit plan and provides for a maximum deductible amount. Beyond these constraints, the employer can determine the contribution amount. Furthermore, ERISA allows a choice of an actuarial cost method from a variety of cost methods available. The cost method selected can be changed in accordance with IRS guidelines. Depending on the particularities of the employee population, different cost methods will produce more or less rapid funding. Finally, while the actuarial assumptions must be reasonable, there is some discretion as to the choice of assumptions, and this choice will influence the rapidity of the funding.

Defined benefit plans have long operated on the principle that upon termination the plan sponsor is entitled to assets in excess of those required to fund accrued benefits. This is a balanced arrangement since the employer is responsible for additional funding to provide the benefits under the plan if poor investment or other experience cause the plan to be underfunded. *Tilley* reverses this principle. Given the discretion described above as to the amount of the defined benefit contribution, employers will increasingly favor funding approaches which result in lower funding levels if the principle enunciated in *Tilley* is not reversed.

C. The Fourth Circuit's Decision is Contrary to the Uniform Interpretations of Section 4044 of ERISA by the Responsible Administrative Agencies

The Fourth Circuit's Decision is contrary to the uniform interpretations of ERISA Section 4044 by the PBGC, the Department of Labor, and the Department of the Treasury.

These administrative agencies adopted guidelines for processing defined benefit plan terminations involving asset reversions in PBGC News Release No. 84-23 (May 23, 1984). These guidelines provide, with respect to plan terminations, that an employer may recover surplus assets after it has purchased and distributed annuity contracts to protect participants against the risk that their accrued benefits may be jeopardized by future market fluctuations or other factors. By contrast, there is no provision for protecting unaccrued benefits.

Consistent with the foregoing, the PBGC has always construed Section 4044(a)(6) and its regulations at 29 C.F.R. Section 2618.16 to limit Section 4044(a)(6) to accrued benefits. See PBGC Opinion Letters 86-1, (January 15, 1986), 85-9 (April 5, 1985) and 85-28 (December 2, 1985).

It should be noted, furthermore, that the PBGC submitted an *amicus curiae* brief in support of a petition for rehearing of the *Tilley* decision by the United States Court of Appeals for the Fourth Circuit. The brief states on Page 12, "The PBGC has never interpreted its regulation to require the payment of unaccrued benefits." It states further, on Page 14, and we wholeheartedly concur, "Because the PBGC is the executive agency charged with administering the provisions of Title IV of ERISA, its views on issues arising out of plan terminations are entitled to great weight. *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 373-74 (1980); *Belland v. Pension Benefit Guaranty Corporation*, 726

F.2d 839, 843 (D.C. Cir. 1984); *United Steel Workers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *Concord Control, Inc. v. International Union, UAW*, 647 F.2d 701, 704 (6th Cir.), *cert. denied*, 454 U.S. 1054 (1981)."

Moreover, the Internal Revenue Service (IRS) in Rev.Rul. 80-229, 1980-2 C.B. 133 (1980) has provided guidelines for determining whether an asset reversion upon plan termination was proper under I.R.C. Section 401(a)(4) (nondiscrimination rules), I.R.C. Section 411(d)(2) and (3) (vesting standards) and ERISA Section 4044(a). In discussing the appropriate treatment of plan assets in excess of the participant's accrued benefits, the Ruling provides that "If the assets as of the date of termination *exceed the present value of the accrued benefits* (whether or not nonforfeitable) as of such date, the plan will not be considered discriminatory if such excess reverts to the employer or is applied to increase benefits in a nondiscriminatory manner (emphasis added)." It should be noted that on September 27, 1987, subsequent to *Blessitt*, the IRS General Counsel issued a Memorandum (GCM 39665) stating that "Nothing in the legislative history of ERISA supports the view that Section 4044(a) creates substantive requirements as to what constitutes a liability."

D. If the Fourth Circuit's Decision is not Reversed, the Case Should be Remanded for an Evidentiary Hearing on Damages

As we have previously indicated, we believe Tilley is incorrect in concluding that participants were entitled to unearned benefits, and should be reversed. If this Court does not concur, there is a significant issue as to the methodology involved in the computation of damages by the Fourth Circuit in determining the amount due to Plaintiffs. The Fourth Circuit

utilized a 5 percent per year reduction factor from age 62 to arrive at the value of the benefit due to plaintiffs. The 5 percent reduction factor was apparently derived from the manner in which the value of normal retirement benefits are computed under the plan for participants who retire after 55. The Fourth Circuit arbitrarily used this same 5 percent reduction factor to compute the value of the early retirement benefit before age 62. Since the 5 percent reduction factor was not contained in the plan, for this purpose, and since, in the opinion of most actuaries, the 5 percent reduction factor will produce a benefit in excess of the actuarial equivalent, we believe this case should be remanded to the Fourth Circuit for an evidentiary hearing on the computation of damages if *Tilley* is not reversed.

CONCLUSION

We believe the decision of the Fourth Circuit in the *Tilley* case was legally incorrect and should be reversed.

Respectfully Submitted,

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AMICUS CURIAE

BRIEF

(16)

No. 87-1868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE MEAD CORPORATION,
Petitioner,
v.
B.E. TILLEY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 requires benefits *not earned* under the terms of a defined pension plan to be paid to participants before surplus assets may revert to the employer upon plan termination.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the written consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner. The Chamber is the largest federation of business and professional organizations in the United States. Its membership encompasses over 180,000 companies, partnerships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber

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[1] A general consent letter signed by counsel for both parties has been filed with the Clerk of this Court.

regularly advocates its member-employers' views in court on issues of national concern to the business community and, in fact, previously submitted a brief *amicus curiae* in this pension case supporting the *Petition for Certiorari.*[2]

This case presents the Court with a question of statutory construction of great concern to all Chamber member-employers that sponsor and maintain defined benefit plans under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*[3] Many of these plans contain some form of early retirement benefit, the class of benefit at issue in this pension plan termination case.

Section 4044(a) of ERISA sets forth the order for distributing plan assets to six categories of benefits eligible for payment upon termination of a pension plan. 29 U.S.C. § 1344(a). To the extent plan assets exceed the benefits claims of Category 1, they are applied sequentially to Categories 2 through 6. §§ 4044(a)(1)-(6); 29 U.S.C. §§ 1344(a)(1)-(6). Any surplus assets remaining after all eligible claims have been satisfied under these categories may be recouped by the employer,

[2] Other important pension cases in which the Chamber has filed *amicus* briefs include *Firestone Tire & Rubber Co.* v. *Bruch*, *cert. granted*, 56 U.S.L.W. 3682 (U.S. April 4, 1988) (No. 87-1054); *Pension Benefit Guaranty Corp.* v. *Yahn & McDonnell, Inc.*, 55 U.S.L.W. 4662 (U.S. June 5, 1987) (No. 86-231, 86-253) (judgment affirmed by an equally divided court); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, *rev'd en banc*, No. 86-8123, *slip op.* (11th Cir. July 8, 1988); *Connors* v. *P&M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986).

[3] Pension plans are divided between defined benefit plans and defined contribution plans. In defined benefit plans, the employer promises a specific level of benefits. For example, the monthly benefit might equal a sum of money times the number of years of employment. In defined contribution plans, the employer agrees to contribute a specified amount of money to an individual participant's account and the participant receives no more than the amount deposited plus earnings.

under the reversion provision, if the plan so provides. § 4044(d)(1); 29 U.S.C. § 1344(d)(1).

The highest category of benefits relevant to this case is Category 5. Category 5 covers "all . . . nonforfeitable benefits" that are not covered in the preceding categories. § 4044(a)(5); 29 U.S.C. § 1344(a)(5). Category 6, the residual benefits category, covers "all other benefits under the plan." § 4044(a)(6); 29 U.S.C. § 1344(a)(6).

The question before the Court is whether ERISA requires employers, upon the termination of a pension plan, to pay *unearned* subsidized early retirement benefits to employees who have not satisfied the plan's age and service requirements. In a startling decision, the Fourth Circuit interpreted Category 6, the residual benefits category, to require that *unearned* benefits be paid before any surplus assets may revert to the employer.

This decision represents a radical departure from what the Chamber and its member-employers have understood to be well-settled principles of benefit distribution and entitlement under ERISA. By interpreting Category 6 to include *benefits for service not yet performed*, the Fourth Circuit has created a new entitlement for pension plan participants which is simply not supported by the statute, by the federal agencies administering ERISA or by well-reasoned case law.

Unless reversed by this Court, the Fourth Circuit's decision will encourage endless litigation over the billions of dollars in benefits that have been distributed inconsistently with this new entitlement. If left standing, the decision also would discourage employers from fully funding their pension plans so as not to create, through conservative funding assumptions, an overfunded plan with no hope of recouping surplus assets. This decision may even discourage some employers from establishing any defined benefit plans in the first place. For these reasons, the Chamber respectfully urges this Court to reverse the decision below.

STATEMENT OF THE CASE

Six former employees of the Mead Corporation ("Mead") sued the company for refusing to award them unreduced subsidized early retirement benefits, even though they had not satisfied the requisite age and service requirements of the plan at the time it was terminated.[4] Mead's retirement plan was a non-contributory, defined benefit plan, which provided three types of benefits based on a participant's age, earnings and years of service at retirement or other termination of employment.

Under the terms of the plan, *normal* (or full) retirement benefits were payable at age 65. The plan also provided for *reduced* retirement benefits, payable at age 55. Although calculated the same as normal retirement benefits, these benefits were actuarially reduced at an annual rate of 5% for each year the participant retired before reaching 65. Participants who had completed 30 years of service and elected to retire on or after reaching age 62, however, were entitled under Article V, Section 2 of the plan to an *unreduced* (or subsidized) early retirement benefit, equal to the amount normally payable at age 65.

Upon termination of the plan in 1983 when Mead sold the Foundry at which the plaintiffs worked, Mead paid its participants, at their option, a lump sum present value of all benefits they had earned for service as of the time of termination. Because the plaintiffs had not fully satisfied the plan's age and service requirements, they were paid the actuarial equivalent of that portion of their normal retirement benefits they had accrued at the time of their severance from Mead. The plaintiffs challenged the reduced benefit calculations, first in state court and then in district court after removal, alleging that they were entitled to the unreduced, subsidized amount payable at age 62.

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[4] Five of the plaintiffs had met only the 30 years service requirement, but had not reached age 62. The other plaintiff failed to satisfy either the age or service requirement.

In granting Mead's motion for summary judgment, the U.S. District Court for the Western District of Virginia held that subsidized early retirement benefits were not "accrued" benefits, and therefore were not payable unless all plan conditions for them were fully satisfied prior to plan termination. U.S. Court of Appeals for the Fourth Circuit reversed the district court's decision. Instead of focusing on the question of whether the early retirement benefits at issue were "accrued" benefits, the Fourth Circuit relied on *dicta* in *Amato* v. *Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986), to conclude that the "all other benefits of the plan" language of Category 6 included early retirement benefits, "even if those benefits were not accrued at the time of termination." *Tilley* v. *Mead Corp.*, 815 F.2d 989, 991 (4th Cir. 1987).

SUMMARY OF ARGUMENT

By ruling that Category 6 includes unearned subsidized early retirement benefits, the Fourth Circuit has created a new entitlement for pension plan participants never before considered by Congress, the courts or the federal agencies responsible for implementing ERISA. This new entitlement was created by the Fourth Circuit's failure to understand what benefits constitute "accrued benefits" under ERISA. This understanding is critical to this Court's appreciation of the magnitude of the Fourth Circuit's error in relying on *dicta* in *Amato* to create this new entitlement.

Moreover, the Fourth Circuit's blind adherence to the *dicta* of *Amato* has dismantled ERISA's carefully-crafted priority system for distributing assets of terminated pension plans. By construing Category 6 to include benefits for service not yet performed, the Fourth Circuit decision has frustrated the clear purpose of ERISA to protect earned benefits. This decision also has

exceeded the scope of the Retirement Equity Act ("REA"),[5] which protects early retirement benefits from being reduced by plan amendment or termination, but allows them to be paid *only* to those participants who *earn* them by continuing employment with the plan sponsor after the plan is terminated and satisfying the plan's age and service requirements at a later date. The Fourth Circuit's interpretation of Category 6 undermines the purposes for enacting REA and conflicts with its requirements that subsidized early retirement benefits must be earned.

ARGUMENT

In the decision below, the Fourth Circuit has created a new entitlement that is fundamentally at odds with the longstanding notion that employees have the right to receive the benefits they have been promised, and for which they have worked. By relying on *dicta* in *Amato* to conclude that Category 6 includes subsidized early retirement benefits, "even if those benefits were not accrued at the time of termination," the Fourth Circuit has introduced a novel concept into the framework of ERISA: a requirement that employers must pay pension benefits for service that will never be performed under the plan. This requirement is contrary to both ERISA and REA.

I. The New Benefit Entitlement Created By The Fourth Circuit Frustrates The Purpose Of ERISA.

A. The Fourth Circuit Did Not Understand The Purpose Of ERISA § 4044(a)(6).

The Fourth Circuit created a new benefit entitlement by applying *Amato*'s assertion that the "all other benefits

[5] Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984).

under the plan" language in Category 6 reflected Congress' intent "not to limit the allocation requirement to *accrued* benefits but to require that, as long as assets were available, they should be used to meet participants' *benefit expectations* based on the Plan's full benefit structure." *Tilley*, 815 F.2d at 992. (emphasis added). The Fourth Circuit's decision, however, reflects a misunderstanding of the categories of benefits eligible for payment in a terminated plan under § 4044(a) of ERISA.

Since the passage of ERISA, Category 6 has consistently been interpreted to include accrued benefits in the sense of benefits attributable to years of service actually performed as of the termination date, but in which the participant has not become "vested" prior to plan termination and which are therefore not covered under Categories 1 through 5.[6] Under many plans, including the Mead Plan, for example, in which participants do not become vested in their benefits until they have completed ten years of service, Category 6 includes the benefits earned by all participants with fewer than ten years of service prior to termination of the plan. Category 6 thus protects a meaningful and substantial universe of plan benefits and participants.

By construing Category 6 to include not only benefits actually earned as of plan termination, but also benefits unearned as of that time, the Fourth Circuit has frustrated the clear purpose of ERISA to protect benefits earned by participants. Under the pre-*Tilley* interpretation of § 4044(a)(6), all assets remaining after payment

[6] *See* Pension Benefit Guaranty Corporation ("PBGC") Opinion Letter No. 86-1 (January 15, 1986), and the preamble to the PBGC's proposed regulations on this point, 40 Fed. Reg. 51368, 51370 (November 4, 1975).

of benefits through Category 5 are available to pay accrued-but-not-yet-vested benefits under Category 6. The Fourth Circuit's interpretation of § 4044(a)(6), however, would require that any assets available to provide Category 6 benefits be allocated not only to benefits accrued by participants prior to the termination, but also to *un*accrued "benefit expectations." Accordingly, a participant with nine years of service prior to the termination (who had thus earned a substantial accrued benefit) would have his rights to plan assets upon plan termination diluted by the inclusion in Category 6 of unearned benefits.

B. The Eleventh Circuit, Sitting *En Banc*, Properly Rejected The "Something For Nothing" Approach in *Blessitt*.

The Fourth Circuit is not the only court of appeals to seize upon *Amato*'s misguided *dicta*. In *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *rev'd en banc*, No. 86-8123 slip op. (11th Cir. July 8, 1988), a three-judge panel of the Eleventh Circuit made the same mistake. It, too, relied on the "benefit expectation" *dicta* in Amato[7] as authority for construing Category 6 to require payment of all "benefits promised under the plan but not yet accrued." *Blessitt*, 817 F.2d at 1531. As a result, the panel awarded the *Blessitt* plaintiffs not only benefits earned as of termination, but also benefits they would have earned in the future. *Id.*

The Eleventh Circuit reversed the panel in a decision *en banc*[8] and soundly rejected the concept of awarding

[7] *Amato*, 773 F.2d at 1416.

[8] The Eleventh Circuit rendered its decision *en banc*, on July 8, 1988, between the time the Petition for A Writ of Certiorari was filed and the Writ was granted in this case.

"benefits for anticipated future years of employment which have not actually been and may never be worked." *Blessitt*, slip op. at 3650. The court *en banc* aptly described this concept as "enabling employees to get something for nothing." *Id.* Thus, the court *en banc* found that including benefits based on future years of service in Category 6 was "contrary to the essential purpose of ERISA" and "would have constituted a major departure from pre-existing law." *Id.* at 3654. Moreover, the court *en banc* also found "*no* mention in the legislative history that ERISA expanded the concept of benefits to which an employee was entitled to include benefits he possibly would earn in the future." *Id.* (emphasis in the original). According to the court *en banc*, "it seem[ed] extremely doubtful that Congress intended to introduce what amounts to a fundamental rethinking of the entire benefits area without any discussion or explanation." *Id.* (citations omitted) (emphasis in the original).

II. The New Benefit Entitlement Created By The Fourth Circuit Is Not Supported By Statute.

A. ERISA's Vesting And Accrual Rules Do Not Apply To Unaccrued Benefits.

The Fourth Circuit's failure to understand what benefits are "accrued" benefits is underscored by its erroneous application of ERISA's vesting and accrual rules to determine whether subsidized early retirement benefits are covered under Category 6. These rules apply only to "accrued benefits." They do not apply to the unearned subsidized early retirement benefits at issue here.

ERISA's vesting and accrual rules determine the amount of the normal retirement benefit which a participant has earned or "accrued" at any time[9] and the por-

[9] 29 U.S.C. § 1054. The purpose of the accrual rule is to require that a (roughly) ratable portion of the normal retirement benefit is earned with each passing year of service.

tion of that accrued benefit in which the participant has acquired enforceable or "vested" rights.[10] To ensure that employees receive the pension benefits they have earned, Congress limited the application of both rules to "accrued benefits," which ERISA defines as "the individual's accrued benefit determined under the plan and . . . expressed in the form of *an annual benefit commencing at normal retirement*." 29 U.S.C. § 1002(23) (emphasis added).

Subsidized early retirement benefits like those at issue here, which are provided by some plans *in addition* to the annual benefit payable at the normal retirement age, are not subject to ERISA's vesting and accrual rules.[11] H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054; ("the accrued benefit does not include the value to the right to receive early retirement benefits. . . ."). H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4935; *Bencivenga* v. *Western Pennsylvania Teamsters & Employers Pension Fund*, 763 F.2d 574, 577-78 (3rd Cir. 1985); Pension Benefit Guaranty Corporation Opinion Letters No. 87-11, Appendix K at 43a and No. 86-1, Appendix K at 47a. Unlike "accrued benefits," in which a participant can earn a portion of the normal retirement benefit, a participant is not entitled to any part of an early retirement benefit unless, and until, all of the plan's conditions for it are satisfied in full.

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[10] 29 U.S.C. § 1053. The vesting rule specifies the point at which a pension benefit has become "nonforfeitable;" it says nothing whatsoever about the amount of the pension that becomes nonforfeitable.

[11] According to Internal Revenue Service regulations "a subsidized early retirement benefit which is provided by a plan is not taken into account [in this exclusion] . . . ." 26 C.F.R. § 1.1411(a)-7(a)(1)(ii) (1977) (emphasis added).

The district court in the case below properly focused on whether the subsidized early retirement benefits at issue here were "accrued benefits," which must be paid upon plan termination, or were benefits which need not be paid at all unless all conditions for them have been satisfied. Consequently, the district court correctly held that the benefits plaintiffs sought were not "accrued benefits" and therefore the plaintiffs were not entitled to them because they had not satisfied the conditions for them. Appendix at 12a.

Contrary to the district court, the Fourth Circuit did not address the "accrued benefits" question. Nevertheless, by allowing participants to receive unearned subsidized early retirement benefits, the Fourth Circuit erroneously subjected such benefits to ERISA's accrual rules. In doing so, the Fourth Circuit created a new entitlement to unearned benefits that is not supported by ERISA.

B. The Fourth Circuit's Retroactive Application of REA Awards Greater Benefits Than The Statute Entitles.

The Fourth Circuit's treatment of subsidized early retirement benefits as "accrued benefits" exceeds the scope of the Retirement Equity Act ("REA"), which amended ERISA to protect early retirement benefits from being reduced by plan amendment or termination. S. Rep. 575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547. For some limited purposes REA, too, protects subsidized early retirement benefits as though they were accrued benefits, but only with respect to plan terminations occurring after July 30, 1984. The plan at issue in this case was terminated in 1983.

Specifically, REA prohibits pension plans from being amended or terminated if the effect is to:

> "eliminat[e] or reduc[e] an early retirement benefit or a retirement-type subsidy . . . with respect to benefits attributable to service before the amendment [for] *a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy* . . . ."

29 U.S.C. § 1054(g)(2) (emphasis added). Under REA, participants who, unlike the plaintiffs here, continue working for the plan sponsor after the plan is terminated are given the opportunity to *earn* early retirement benefits after the termination date *if* they later satisfy the plan's age and service requirements. Participants, like the plaintiffs here, whose employment is severed before the plan's age and service requirements have been satisfied are not entitled to receive any post termination early retirement benefits; REA only provides benefits to participants who earn them.

The Fourth Circuit's new benefit entitlement not only applies REA retroactively but, by granting credit for service that will never be performed, also *significantly* surpasses it. Unless reversed by this Court, the Fourth Circuit's interpretation of Category 6 will turn REA into a benefit reduction statute rather than the benefit protection statute Congress intended.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States respectfully urges this Court to reverse the Fourth Circuit and hold that ERISA does not require terminating pension plans to pay unearned early retirement benefits before any surplus assets may revert to the employer.

Respectfully submitted,

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November 17, 1988

AMICUS CURIAE

BRIEF

(17)

NO. 87-1868

IN THE

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THE MEAD CORPORATION,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYEE BENEFITS INSTITUTE IN SUPPORT OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYEE BENEFITS INSTITUTE IN SUPPORT OF PETITIONER

The National Employe Benefits Institute ("NEBI") submits this brief as amicus curiae, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the Petitioner in No. 87-1868, having obtained the written consent of both the Petitioner and the Respondents to file same.

INTEREST OF AMICUS CURIAE

NEBI was established in 1977 to monitor, evaluate and comment on pending legislation, regulations and other legal devel-

opments affecting employee benefits at all levels of government. NEBI's membership includes a number of concerned businessess, representing in the aggregate over $150 billion in pension assets. NEBI's primary purpose is the promotion of reasonable pension laws, and the modification or elimination of laws that are either unnecessary or harmful to the health of the private pension system.

NEBI is submitting this brief to urge this Court to reverse *Tilley v. Mead Corp.*, 815 F.2d 989 (4th Cir. 1987). That decision misconstrued the relevant legal authorities, in particular Section 4044 of the Employee Retirement Income Security Act of 1974 ("ERISA"), to require terminating defined benefit pension plans to pay unaccrued early retirement benefits before any residual assets can revert to the plan sponsor. If it is allowed to stand, the decision would seriously impair the stability and viability of the private pension system.

SUMMARY OF ARGUMENT

This brief responds to two principal arguments raised by the Respondents and the court in *Tilley*, and the decisions on which they rely. These are (1) that ERISA § 4044(a)(6), 29 U.S.C. § 1344(a)(6), requires assets of a terminating pension plan to be allocated, to the extent available, to pay for unaccrued subsidized early retirement benefits, and (2) that, even if it does not, subsidized early retirement benefits should be considered accrued benefits under ERISA. This brief demonstrates that both positions are irreconcilable with the statutory scheme of ERISA. It also shows that, even if *Tilley* is allowed to stand, the decision should be limited to its facts, and ERISA § 4044(a)(6) should not be read (as it was in *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *vacated & reh'g en banc granted*, 836 F.2d

1571 (11th Cir. 1988), for example) to require payment of retirement benefits based on future years of service not actually performed as of the date of plan termination.

ARGUMENT

A. Tilley is Inconsistent With the Statutory Scheme of ERISA

It will be easier to understand the error in *Tilley* after a brief explanation of the statutory scheme of ERISA by which the operation of pension plans is governed.

1. Background

Congress enacted ERISA in 1974. ERISA represented a very large addition to the existing Federal rules for pension plans, which were largely contained in the Internal Revenue Code ("I.R.C."). ERISA contains four titles. Titles I and II are identical in many respects, placing the same provisions into the labor title of the United States Code as well as into the I.R.C. Included in these overlapping provisions are requirements for plan participation, vesting in benefits, accruals of benefits, and funding for pension plans. After ERISA's enactment, the Department of Treasury, through the Internal Revenue Service ("IRS"), and the Department of Labor divided responsibility for these overlapping provisions between them.

Title I also contains provisions that were placed exclusively in the Labor title, including provisions for plan reporting and disclosure and exclusive fiduciary rules governing the conduct of plan fiduciaries. Title III contained general administrative provisions. Title IV was a new concept: it provided for a system of insurance for private pension plans, and

created a new agency within the Department of Labor, the Pension Benefit Guaranty Corporation (the "PBGC"), to administer the system. The PBGC is an independent, nonprofit corporation. It acts as a government insurance company, administering a pension insurance program funded largely by annual premiums paid to all the plans covered by the program, equal to a per-participant dollar amount. ERISA § 4006, 29 U.S.C. § 1306.

2. Accrual Versus Vesting

Employees earn pension benefits by rendering service to an employer. The level of the benefits is determined by their position, compensation, personal circumstances and other factors. The rate at which benefits are earned under ERISA is governed by two sets of rules: those relating to accrual and those relating to vesting. As the Third Circuit observed in *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1523 (3d Cir. 1988), "the concepts of accrued benefits and vested (*i.e.*, nonforfeitable) rights are quite distinct." Much of the Respondents' argument reflects confusion between the two concepts.

Accruals of benefits under a pension plan are generated according to the formula chosen by the employer and provided under the plan. ERISA does not require any particular formula, but does limit the way in which any particular formula may operate. I.R.C. § 411(b), 26 U.S.C. § 411(b); ERISA § 204, 29 U.S.C. § 1054. For example, a formula might provide an annual pension payable at normal retirement age equal to the product of $1,000 by such employee's years of service. Under this formula, an employee with three years of service would have accrued an annual pension of $3,000. The $3,000 annual pension would be called his "accrued benefit". *See* I.R.C. § 411(a)(7), 26 U.S.C. § 411(a)(7); Treas. Reg.

§ 1.411(a)-7(a). Another formula might provide for the payment of a benefit only if a particular event, *e.g.*, layoff as a result of a plant closing or early retirement as in this case, occurred. In such case, an employee would have no accrued benefit until the event occurred.

Looking to the plan for the scope of an employee's accrued benefit is consistent with the purpose of ERISA, which was to allow employers, often in consultation with employee representatives, to offer as much or as little pension benefits to employees as they believed necessary to achieve a stable and productive work force and to provide for their employees' retirement; while ensuring that, once such benefits had been offered to employees on particular terms, and those terms had been offered to employees on particular terms, and those terms had been satisfied, the benefits would not be rescinded or left unpaid for want of funds. *See* H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* II *Legislative History of ERISA* 3134-35 (Comm. Print 1976) (discussing role of ERISA in a voluntary private pension plan system); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1176 (11th Cir. 1988).

An employee with an accrued benefit may not be immediately entitled to receive the benefit, or he may not be entitled to receive all of it. Whether an employee is unconditionally entitled to his accrued benefit is determined under the plan in conformity with ERISA's *vesting* rules. I.R.C. § 411(a), 26 U.S.C. § 411(a); ERISA § 203, 29 U.S.C. § 1053. In some plans, employees vest in their benefits as soon as they accrue. In others, employees earn vesting rights through years of service or upon the occurrence of particular events, such as the attainment of age 65 or termination of the plan. When an employee retires, his pension rights are derived by multiplying his accrued benefit by his vesting percentage. An employee

who is 100 percent vested is paid a pension equal to his entire accrued benefit, while an employee who is 80 percent vested receives 80 percent of his accrued benefit and forfeits the remaining 20 percent. Thus, as the Third Circuit observed in *Hoover v. Cumberland, M.D. Area Teamsters Pension Fund*, 756 F.2d 977, 983-84 (3d Cir. 1985), "[t]he concepts of accrued on the one hand, and vested or 'nonforfeitable', on the other, are related, but not the same . . . . Vesting provisions do not affect the amount of accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable."

3. Funding

Pension plan funding is subject to a separate set of rules that set certainminimums and maximums for employer contributions. *See* I.R.C. § 412, 26 U.S.C. § 412; ERISA §§ 301 *et seq.*, 29 U.S.C. §§ 1081 *et seq.* The amount an employer may contribute to fund a pension plan any year may vary under these rules. This is because plan funding is an inexact science requiring predictions regarding mortality rates, interest rates, employee turnover, length of employee service, the age at which employees retire, and changes in the size of the employee population. While a plan's pension accrual formula is one of the factors taken into account under the funding rules, because of the inexact nature of pension funding there is no necessary correlation between the amount of benefits accrued under a plan at any time and the amount of funds in the lan at such time.

In conclusion, accrued and vested benefits and plan funds increase and decrease at different rates. Because vested benefits are by nature a percentage of accrued benefits, they are always equal to or less than the amount of accrued benefits. However, plan funds might be greater than, less than or equal to accrued benefits.

4. Insurance

Defined benefit plans, like the one in the instant case, are covered by Title IV's pension insurance program. While, as a general rule, the benefits insured by the PBGC are based on the benefits provided under a plan, such insurance is subject to certain limitations, including (1) a maximum amount per participant, (2) only benefits vested prior to the termination of the plan, and (3) a five-year phase-in of the protection for newly created pension benefits. ERISA §§ 4022-22B, 29 U.S.C. §§ 1322-22B; 29 C.F.R. Parts 2613 & 2621.

The PBGC system is designed to guarantee benefits provided under a pension plan, rather than to guarantee a minimum pension. The PBGC guaranteed benefits will therefore never be greater than the amount of accrued benefits under a plan. In most cases, because of the limits on guaranteed benefits, the level of guaranteed benefits will be less than the amount of accrued benefits. The level of guaranteed benefits can never exceed the amount of accrued or vested benefits.

The consequences of a plan termiantion, all of which are prerequisites for PBGC approval, are as follows: (1) first, all accrued benefits under the plan become fully vested, regardless of the plan's vesting schedule; (2) next, plan funds are allocated to provide for plan benefits in accordance with the allocation priorities of ERISA § 4044(a), 29 U.S.C. § 1344(a); (3) then, plan benefits are paid out to participants, usually in the form of a lump sum in cash, representing the commuted value of a benefit, or an annuity certificate purchased from an insurance company providing for the participant's pension benefits; (4) if any plan funds remain at this point, they may revert to the employer; (5) if the amount of plan funds is less than the amount of guaranteed benefits, the PBGC makes up the difference; otherwise, the PBGC pays out no money on account of the plan termination. See generally

ERISA §§ 4041-49, 29 U.S.C. §§ 1341-49; 29 C.F.R. Parts 2615-19.

5. Controversy in Tilley

The controversy in this case concerns steps (1) and (2) above, *i.e.*, the determination of accrued benefits which vest on termination of the plan, and the allocation of benefits under the six categories of ERISA § 4044(a). Respondents erroneously assert that subsidized early retirement benefits for which they were ineligible on the date of termination were accrued benefits under step (1), and, alternatively, that such benefits are included in the six categories of ERISA § 4044(a) under step (2) (thus reducing any possible employer reversion under step (4)).

The six allocation categories under ERISA § 4044(a) are: (1) and (2) employee contributions; (3) and (4) benefits guaranteed by the PBGC; (5) all other nonforfeitable benefits under the plan; and (6) all other benefits under the plan. "Nonforfeitable benefits" under category (5) refers to benefits that were nonforfeitable prior to the plan termination. ERISA § 4022(a), 29 U.S.C. § 1322(a); 29 C.F.R. § 2618.2. The principal issue before the Court is the proper interpretation of category (6).The Petitioner contends that it does not include benefits which have not accrued. The Respondents contend, and the Fourth Circuit in *Tilley* held, that it is not limited to accrued benefits, but also includes subsidized early retirement benefits that have not been earned because employees have not satisfied the requirements to receive them.

The foregoing is summarized in Table I of the Appendix. Column (1) shows accruals. The lower portion shows the benefits accrued to the date of plan termination. The remainder represents the theoretical benefits Respondents may have accrued in the future if the plan had not terminated and they

had continued in service. Unlike accrued benefits, these benefits cannot be calculated precisely, because they vary according to the assumptions made about the future with respect to an employee's compensation, years of service and other factors. This box includes the Respondents' unaccrued early retirement benefits.

Column (2) shows plan funds. The upper portion represents the excess of plan funds over accrued benefits at the time of termination. This portion represents the only amount which reverts to the employer under the view of the Petitioner, the IRS, the PBGC and the Department of Labor.

Column (3) shows vested benefits. The lower portion represents benefits vested by law, while the upper portion represents benefits vested solely on account of plan termination. Because ERISA requires that all accrued benefits be vested on plan termination, I.R.C. § 411(d)(3), 26 U.S.C. § 411(d)(3), column (3) equals the hatched portion of column (1).

Column (4) refers to PBGC insurance, and sets forth the ERISA § 4044(a) allocation categories. The hatched portion representing benefits guaranteed by the PBGC as of the date of plan termination is slightly smaller than the box of vested benefits in column (3) because of the limitations on guaranteed benefits discussed above. This portion includes the first four allocation categories under ERISA § 4044(a). The box labeled category (5) represents all "nonforfeitable" benefits remaining that are in excess of the PBGC guaranteed amounts. As noted above, because "nonforfeitable" for these purposes does not include benefits vested solely on account of the plan termination, this category does not include the entire column of vested benefits, but only those vested prior to plan termination. Although not insured, these benefits are fully funded on termination.

Petitioner, the IRS, the PBGC and the Department of Labor all contend that category (6) "all other benefits under the plan", refers only to all other accrued benefits, and therefore the box labeled "Respondents' category (6)" extends only to the level of the accrued benefits in column (1). These benefits are fully funded on plan termination. By contrast, Respondents' position is that category (6) includes all early retirement benefits to the extent that the employees have begun to earn them, *i.e.*, begun to satisfy the eligibility conditions placed on them by the plan. The final box, *i.e.*, Respondents' category (6), represents the unknown quantity of such early retirement benefit expectations.

B. ERISA § 4044(a)(6) Is Not a Vesting Provision

The Fourth Circuit in *Tilley* agreed with the Respondents that category (6) of ERISA § 4044(a) included both accrued and unaccrued early retirement benefits. In so holding, the court relied heavily on dictum to that effect in the Second Circuit's opinion in *Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985). As explained below, the Second Circuit's analysis in *Amato* and Respondents' additional arguments in support of it are inconsistent with the scheme of ERISA outlined above, and must be rejected.

1. Analysis of 4044(a)

Both *Tilley* and *Amato* suggest that their reading of ERISA § 4044(a)(6) is required by the fact that the provision does not contain the word "accrued". *Amato*, 773 F.2d at 1415; *Tilley*, 815 F.2d at 991. While this is the source of the confusion that gave rise to Respondents' suit, it does not prove their point: as the Eleventh Circuit recently observed, it is more reasonable to read the phrase "other benefits under the plan" as encompassing only benefits to which participants are actually entitled on the date of termination, *i.e.*, *accrued benefits*. *Blessitt*, 848 F.2d at 1169; *accord* Brief for the Pension Benefit Guaranty Corporation as Amicus Curiae in Support of the Petition at 12.

This reading also has the virtue of limiting ERISA § 4044(a) to its true allocational role. The *Amato* and *Tilley* courts erred when they assumed that category (6) of ERISA § 4044(a) was a vesting provision. Category (6) is only relevant to determining the rights of participants to funded benefits at plan termination. The vesting provisions of ERISA, which determine employees' rights to benefits, are set forth in Titles I and II. By contrast, Title IV (which includes Section 4044), sets forth the pension insurance provisions, and cannot supplement participants' rights to benefits. As the Third Circuit stated in *Ashenbaugh* in rejecting *Amato*, it is "clear that ERISA § 4044, 29 U.S.C. § 1344, does not create a right in early retirement benefits, but only sets priorities to be applied in cases where plan funds are not sufficient." 854 F.2d at 1529.

As shown by the following passage from the legislative history of ERISA, category (6) is actually part of an asset allocation scheme added to Title IV to preserve the termination insurance system:

> To protect against evasion of the above-described limits on insurance benefits by use of pension assets to first pay uninsured benefits . . . the Committee bill . . . sets forth an order of priorities for allocation of plan assets on failure of the plan. Plan assets are to be allocated, in order, to . . . contributions of employees, benefits "in pay status" for at least three years, and insured benefits (other than those falling into any of the prior categories). Where all

> these categories could be paid in full from plan assets, there would be no [PBGC] losses.

S. Rep. No. 383, 93d Cong., 1st Sess. 84 (1973), *reprinted in I Legislative History of ERISA* at 1152. In other words, the need for allocation priorities derived from the limit on the pension guarantee provided by the PBGC. Because the PBGC did not guarantee all benefits, the law required that assets first be allocated to accrued insured benefits (after the return of employee contributions) before being allocated to uninsured benefits. Otherwise, the insurance system could be circumvented by providing for uninsured benefits first, and requiring the PBGC to make up any shortfall on the insured benefits.

2. Comparison with 411(d)(3)

The *Amato* and *Tilley* courts' error in creating vesting rights out of category (6) can also be demonstrated by the fact that their interpretation cannot be reconciled with the remainder of the statutory framework.

The *Amato* and *Tilley* decisions nullify the vesting requirements of ERISA. ERISA § 1012 enacted I.R.C. § 411(d)(3), 26 U.S.C. § 411(d)(3), which specifically sets forth the rights of plan participants to benefits in the event of plan termination. Section 411(d)(3) provides that "the rights of all affected employees to benefits accrued to the date of such termination . . ., to the extent funded as of such date, . . ., are nonforfeitable." Neither court ever addressed the issue of why Congress would have limited employees' rights at termination to accrued benefits under I.R.C. § 411(d)(3), while at the same time enacting ERISA § 4044(a)(6), which, under their view, required payment of *all* benefits, accrued or otherwise.

3. Comparison with 411(d)(6)

The *Amato* and *Tilley* decisions also render meaningless I.R.C. § 411(d)(6)(B), 26 U.S.C. § 411(d)(6)(B), and the identical provisions of ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2). Both sections were enacted as part of the Retirement Equity Act of 1984 ("REA") and generally apply to plan terminations after July 30, 1984 (*i.e.*, after the termination of the instant plan).

I.R.C. § 411(d)(6), as amended by REA, was designed to protect early retirement benefits, retirement-type subsidies and optional forms of benefit. It provides that plan amendments (including plan terminations) that reduce or eliminate such *accrued but conditional* benefits may not be applied with respect to a plan participant who satisfies the conditions placed on receipt of the benefit either *before or after* the amendment is made. The converse of this is that participants are not entitled to such accrued but conditional benefits if they do not satisfy the conditions after the plan is amended or terminated. S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984). If this Court follows the *Amato* and *Tilley* decisions, I.R.C. § 411(d)(6) will be rendered meaningless: since those courts would award all plan benefits to participants immediately upon plan termination, there would never be any need for the participants to satisfy the conditions for receiving a benefit later. *Ashenbaugh*, 854 F.2d at 1527 (quoting S. Rep. No. 575, 98th Cong., 2d Sess. 28).

4. Interpretation by ERISA Agencies

All three of the agencies charged with the administration of ERISA — the IRS, the PBGC and the Department of Labor — have rejected the interpretation of ERISA § 4044(a)(6) adopted by the *Amato* and *Tilley* courts and concluded that category (6) refers only to accrued benefits.

a. **PBGC**

The PBGC has made its position clear in a series of advisory opinions, Advisory Opinion 86-5 (March 6, 1986); Advisory Opinion 86-1 (Jan. 15, 1986); Advisory Opinion 85-28 (Dec. 2, 1985); Advisory Opinion 85-9 (April 5, 1985); Advisory Opinion 82-28 (Oct. 15, 1982), and in the preamble to regulations under ERISA § 4044, 40 Fed. Reg. 51368, 51370 (Nov. 4, 1975). It reaffirmed its position in its amicus brief in this case. Brief for the Pension Benefit Guaranty Corporation as Amicus Curiae in Support of the Petition at 12.

b. **IRS**

The IRS recently considered the *Blessitt* court's initial opinion, 817 F.2d 1528 (11th Cir. 1987), which had been based on *Tilley* and *Amato*, and rejected it. Instead it agreed with the PBGC view that ERISA § 4044 was only intended "to protect the [PBGC] from financial responsibilitity for guaranteed benefits when there were sufficient plan assets in the plan to pay these benefits", and was not a provision describing liabilities on plan termination. General Counsel's Memorandum 39665 (Sept. 25, 1987).

It further stated that the only liabilities that must be satisfied prior to a reversion of plan assets to an employer on plan termination are those protected by I.R.C. § 401(a)(2), 26 U.S.C. § 401(a)(2), which, it concluded, did not include the unaccrued benefits payable under the Eleventh Circuit's original opinion in *Blessitt*. I.R.C. § 401(a)(2) predates ERISA, and its regulations describe what benefits must be provided for before any amount reverts to an employer on plan termination. The regulations provide that only "fixed and contingent" liabilities need to be provided on plan termination. Treas. Reg. § 1.401-2(b). The IRS has long interpreted this to mean only *accrued* benefits. *E.g.*, IRS Pub. 778, Part 3(d) (Rev. Feb. 1972); Rev. Rul. 69-421, Part 3(d), 1969-2 C.B. 59. The Eleventh Circuit in its subsequent opinion expressly endorsed this position. *Blessitt*, 848 F.2d at 1170 (citing IRS Pub. 778, Part 3(d)).

The Eleventh Circuit's initial decision in *Blessitt* actually went far beyond the decisions in *Tilley* and *Amato*, to hold that a terminating plan may be required under ERISA § 4044(a) to pay retirement benefits based on future years of service that participants have not performed on the date of termination, and may never perform. 817 F.2d at 1166. Nevertheless, it relied on the same analysis as *Amato*, and the IRS' rejection of it clearly applies in this case.

The Respondents claim that Rev. Rul. 85-6, 1985-1 C.B. 133, which required a defined benefit pension plan to provide an early retirement subsidy for participants who satisfied the pretermination requirements after the termination of the plan, represents the IRS' current interpretation of I.R.C. § 401 (a)(2). Respondents' Brief in Opposition to Petition for a Writ of Certiorari at 19-22. This claim is incorrect: Rev. Rul. 85-6 specifically states that its holding is based on I.R.C. § 411(d) (6)(B), 26 U.S.C. § 411(d)(6)(B), which was added by REA and applies, as noted above, only to plan terminations after July 30, 1984.

The Respondents are also wrong in asserting that a reversion in this case would violate the requirement in Treas. Reg. § 1.401-2(b) that, in order to satisfy I.R.C. § 401(a)(2), a reversion must result from "actuarial error." Respondents' Brief in Opposition to Petition for a Writ of Certiorari at 23-26. The error in this case concerned how long participant would continue to earn benefits — *i.e.*, how long the plan would continue in existence. Nothing in the legislative history of I.R.C. § 401(a)(2) suggests that such errors cannot be considered

"actuarial errors." *See* H.R. Rep. No. 1860, 75th Cong., 3d Sess. 24 (1938). Moreover, the IRS has consistently taken the position the "actuarial error" requirement is satisfied if the reversion is limited to funds remaining after the satisfaction of fixed and contingent benefits. Rev. Rul. 83-52, 1983-1 C.B. 87.

c. **Department of Labor**

The Department of Labor agrees that only accrued benefits need be provided for on plan termination prior to a reversion of plan assets to an employer. It joined the Treasury Department and the PBGC in issuing the Implementation Guidelines on Asset Reversions (May 23, 1984), which specifically require provision only for accrued benefits prior to an asset reversion.

5. Legislative History

The last prop under the *Amato* and *Tilley* decisions is their reading of the legislative history of ERISA § 4044(a)(6). The decisions did not cite the legislative history referred to above, which indicates that category (6) was never intended to grant substantive rights beyond the vesting provisions under Titles I and II of ERISA. Instead, they focused on a change made in conference to resolve the differences between the final House and Senate bills. A closer look at the legislative history shows that the courts' interpretation cannot be sustained.

None of the bills preceding the final version of ERISA ever provided for an allocation of assets on plan termination to anything other than accrued benefits.[1] The *Amato* and *Tilley* courts pointed out that the final House version of ERISA provided for allocation to "other accrued benefits" while the final legislation substituted "all other benefits." They concluded from this that something more than accrued benefits must have been intended in the final legislation. The legislative history is silent as to the reason for this change, and it is not self-evident from the change itself that something more than accrued benefits must have been intended by the final legislation.

In fact, given the context, it would have been incongruous for the Conference Committee to have intended the *Amato* and *Tilley* result. Despite differences in wording, neither the House nor the Senate bill would have required an allocation to all non-accrued benefits. The last category of the Senate bill's version of Section 4044(a) was simply "other insured benefits." H.R. 2, 93d Cong., 2d Sess. § 444 (1974), *reprinted in* III *Legislative History of ERISA* at 3720-22. However, Section 511 of the bill would specifically have allowed a reversion of assets to an employer on plan termination "after complete satisfaction of the rights of all beneficiaries to benefits *accrued* to the date of dissolution or termination." *Id.* at 3772-3 (emphasis supplied). Similarly, the House bill would have permitted a reversion after an allocation to accrued benefits, earnings on employee contributions and benefits which the plan provided for only in the event of plan termination. *Id.* at 3956-63. Thus, *Amato* and *Tilley* require one to believe that the Conferees "compromised" on something provided by neither bill — in fact, something going considerably beyond

[1]H.R. 2, 93d Cong., 2d Sess. § 112(b) (1974) (House), *reprinted in* III *Legislative History of ERISA* at 3957; H.R. 2, 93d Cong., 2d Sess. § 444 (1974) (Senate), *reprinted in* III *Legislative History of ERISA* at 3720; H.R. 12906, 93d Cong., 2d Sess. § 112(b) (1974), *reprinted in* II *Legislative History of ERISA* at 2820; H.R. 4200, 93d Cong., 1st Sess. § 444 (1973) (as introduced in the Senate), *reprinted in* II *Legislative History of ERISA* at 2003; S. 4, 93d Cong., 1st Sess. § 444 (1973), *reprinted in* I *Legislative History of ERISA* at 1320; S. 1179, 93d Cong., 1st Sess. § 444 (1973), *reprinted in* I *Legislative History of ERISA* at 927; H.R. 9824, 93d Cong., 1st Sess. § 112(b) (1973), *reprinted in* I *Legislative History of ERISA* at 734.

either bill — *i.e.*, requiring funding for accrued benefits plus all future unaccrued benefits, without so much as noting this significant change in the Conference Report.

C. Subsidized Early Retirement Benefits Are Not Accrued Benefits

The defects described above in the *Amato* and *Tilley* courts' analysis of ERISA § 4044(a) are sufficient grounds for this Court to reverse *Tilley*, since the Fourth Circuit relied exclusively on that analysis in concluding that the Respondents were entitled to a portion of their unaccrued early retirement benefits on plan termination. 815 F.2d at 991 (noting that it had not been asked to determine whether such benefits were accrued). Nevertheless Respondents argue that, assuming ERISA § 4044(a) is inapplicable to unaccrued benefits, their subsidized early retirement benefits should be considered accrued benefits. Respondents' Brief in Opposition to Petition for a Writ of Certiorari at 11. Since this issue is also discussed at length by the Second Circuit in *Amato*, 773 F.2d at 1407-14, it is addressed briefly below.

1. Statute

The *Amato* court reached the conclusion that subsidized early retirement benefits for which participants have not satisfied the eligibility conditions may be accrued benefits by misconstruing the language and legislative history of the I.R.C. and ERISA. The court asserted that I.R.C. § 411(a)(7)(A)(i), 26 U.S.C. § 411(a)(7)(A)(i), and ERISA § 3(23), 29 U.S.C. § 1002(23), which define "accrued benefit" to mean an "employee's accrued benefit determined under the plan. . . expressed in the form of an annual benefit commencing at normal retirement age," include such benefits, even though they

are by definition never provided as a benefit commencing at normal retirement age. 773 F.2d at 1407-08. The court argued that a participant's subsidized early retirement benefit qualifies as an accrued benefit as long as it is "stated in the *same form* as that to which he or she would be entitled at [normal retirement age]." *Id.* at 1408 (emphasis in original).

The *Amato* court's position is directly contradicted by I.R.C. § 411(c)(3), 26 U.S.C. § 411(c)(3), and ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), which provide that, where a benefit "is to be determined as an amount other than an annual benefit commencing at normal retirement age," the employee's accrued benefit "shall be the actuarial equivalent of such benefit amount . . . ." These sections are clearly designed to address the proper treatment of benefits payable in the same *form* as an annual benefit commencing at normal retirement age but at different times. The rule they supply is that the accrued portion of such benefits is limited to the actuarial equivalent of the benefits commencing at normal retirement age.

Had the Respondents earned them, the early retirement benefits in the instant case would arguably have been payable in the same form as their normal retirement benefits, only earlier. Thus, an actuarial reduction would have been required under I.R.C. § 411(c)(3) and ERISA § 204(c)(3). Since the subsidy element of the early retirement benefits which is at issue here is precisely the lack of such an actuarial reduction for early retirees meeting the plan's eligibility requirements, it is this subsidy element that I.R.C. § 411(c)(3) and ERISA § 204(c)(3) prohibit being taken into account in determining their accrued benefits.

2. Regulations

The *Amato* court's position is also directly contradicted by Treas. Reg. § 1.411(a)-7(a)(1), which provides that, for purposes of determining a participant's accrued benefit under a defined benefit pension plan "a subsidized early retirement benefit is not taken into account . . . ." The court's attempt to distinguish this regulation by claiming that the term "subsidized early retirement benefit" has not been reliably defined, 773 F.2d at 1413, is unavailing. *See, e.g.*, D. McGill, *Fundamentals of Private Pensions* 120 (5th ed. 1984) ("[t]he general practice of using early retirement factors more favorable than the actuarially equivalent ones is referred to as 'subsidized early retirement'").

3. Legislative History

Finally, the *Amato* court's position is contradicted by the legislative history of ERISA, which clearly states that "accrued benefit does not include the value of the right to receive early retirement benefits." H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* III *Legislative History of ERISA* at 4540; H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* II *Legislative History of ERISA* at 3180. As the Third Circuit observed in *Ashenbaugh*, 854 F.2d at 1526, the *Amato* court's claim that these statements do not refer to "unreduced early retirement benefits" because such benefits are not expressly mentioned reflects a misunderstanding of the meaning of that term, and has been implicitly rejected by a number of other courts.

The legislative history of REA does not suggest otherwise. As noted above, REA added I.R.C. § 411(d)(6)(B), 26 U.S.C. § 411(d)(6)(B), and ERISA § 204(g), 29 U.S.C. § 1054(g), which prohibit the elimination or reduction of early retirement

subsidies to the same extent as if they were accrued benefits. The *Amato* court noted that the report on the Senate bill, which later became REA, stated that no inference was intended to be made on the basis of this amendment as to the scope of the anti-cutback rule before REA, S. Rep. No. 575, 98th Cong., 2d Sess. 28, whereas the House report indicated that the provision was part of a codification of certain IRS rulings, H.R. Rep. 655, Pt. 2, 98th Cong., 2d Sess. 25 (1984). The *Amato* court concluded from this that Section 411(d)(6)(B) also codified prior practice. 773 F.2d at 1411. However, the rulings cited by the House report were limited to benefits already accrued at the time of an amendment, and the final REA legislation clearly did not treat early retirement benefits as "accrued" unless and until employees satisfied the eligibility conditions therefor. *Accord Ashenbaugh*, 854 F.2d at 1527.

4. Accrusal Versus Earning

The Respondents also argue that they have "earned" a portion of their subsidized early retirement benefits and should be given a portion of them on that basis. Respondents' Brief in Opposition to Petition for a Writ of Certiorari at 9-10. In addition to the fact that it has no legal foundation, the difficulty with this argument is that there is no fixed meaning to the term "earned." The Respondents readily admit that they would have had no claim to their early retirement benefits if their situation had been similar to that in *Blessitt*, where employees were seeking to be paid for services they had not, and might never, perform. Respondents' Brief in Opposition to Petition for a Writ of Certiorari at 11. The Respondents may feel that they have earned a pro rata portion of their early retirement benefits by satisfying almost all of the criteria required to be eligible for the benefits under the plan. However, the plan clearly provides that they have not earn-

ed any of the benefits because they have not satisfied all of the criteria for them. There are good business reasons for allowing employers to limit the availability of benefits in this manner: one of the purposes of vesting and accrual rules in pension plans is to encourage employees to make a long-term commitment to their employer, rather than feel free to leave with a large portion of their benefits.

D. Tilley Adversely Affects Pension Policy

The foregoing discussion has focused on the technical aspects of this case. The policy context is equally important.

1. General Factors Impacting Terminations and Reversions.

The plan termination that gave rise to this case exists in a broader context. According to information obtained from the PBGC, pension terminations involving over $45 billion in assets and over $16 billion in employer reversions occurred from 1980 through June 30, 1987. *See* Table II of the Appendix. The existence of these surpluses results from several factors. One was the 1974 enactment of funding requirements by ERISA. I.R.C. § 412, ERISA §§ 301-307, 29 U.S.C. §§ 1081-87. Another was the surge in interest rates in the 1970s and in stock prices in the 1980s. *See Pension Benefit Guaranty Corporation 1984 Annual Report* 6 (1984). In addition, there has been a contraction in employment in many industries in response to increasing worldwide competition, resulting in sharply decreased future benefit costs. *See, e.g., Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 959 (3d Cir. 1984).

Reversions resulted in this context in part because the surpluses generated were unprecedented. In addition, an in-

creasingly competitive business environment forced employers to become more efficient with the use of available funds; leaving surpluses in pension plans where they would not be needed and were not benefiting anyone thus simply became unaffordable. Employers have also to answer to stockholders with respect to the use of pension funds without proper regard for shareholder interests. *E.g., Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252 (S.D.N.Y. 1985).

These forces had an impact on employers generally and were not part of any sinister design to deprive employees of pension benefits. These terminations have not affected the strength of the pension system. In the PBGC *1984 Annual Report*, ten years after ERISA's enactment, Senator Javits, one of the moving forces behind the pension legislation, noted that since 1971 private pension coverage had been extended from 25 million to 40 million workers, and from $100 billion in assets to $900 billion.

2. Defined Benefit Plans

Reversions do not allow employers to break benefit promises to employees. In a defined benefit plan like the one in this case, the plan sets forth a particular benefit for which the employer must then fund. If the funds fall short, the employer must add more to the plan; that is, the investment risk is on the *employer.* It is only in defined benefit plans, where the employer bears the risk of a shortfall, that it can get a reversion of any surplus. McGill, *Fundamentals of Private Pensions*, at 26-7; ERISA § 403(c), 29 U.S.C. § 1103(c). The employer's enjoyment of good funding experience, therefore, is simply the trade-off for its bearing the burden of poor funding experience.

Reversions also are not inconsistent with the granting of tax benefits to employers for contributions to a plan. Where

an employer has derived a tax benefit from such contributions, it must include the reversion in income. In addition, for terminations after 1985, it must pay a ten percent excise tax on the reversion to reflect the fact that earnings on such contributions have been allowed to accumulate free of tax. I.R.C. § 4980, 26 U.S.C. § 4980.

3. The Balance of Competing Policies

The previous points are part of a larger one, which is that issues of pension policy require the balancing of competing interests. The legislative history of ERISA reveals a considerable concern on Congress' part to balance "the primary goal of benefiting employees and the subsidiary goal of containing pension costs" so as not to discourage employers from offering them to their employees in the first place. H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in II Legislative History of ERISA* at 3134-35: *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 515 (1981). These concerns are just as pertinent now as they were when ERISA was enacted. If this Court follows *Amato* and *Tilley* in increasing the benefits that must be provided on plan termination far beyond uniform industry practice, the inevitable consequence will be that employers will be discouraged from setting up pension plans. A corollary to this is that employers will fund pension plans conservatively, and perhaps underfund them, because any surplus funds can never be recouped. *Accord Chait v. Berstein*, 835 F.2d 1017, 1027 (3d Cir. 1987). Thus, following *Amato* and *Tilley* could work to the possible detriment of employee interests.

E. Even if Tilley is Allowed to Stand, It Should be Limited to its Facts

The analysis that the Fourth Circuit used in *Tilley* to conclude that the Respondents were entitled to unaccrued subsidized early retirement benefits has been shown above to be deeply flawed. It misconstrues ERISA § 4044 and results in the payment of benefits to which the Respondents are not entitled under the terms of the plan. Should the Court decide to let *Tilley* stand, however, that decision should clearly be limited to its facts, to avoid endorsing the far more expansive interpretation of ERISA § 4044 advanced by the Eleventh Circuit in its initial decision in *Blessitt*, 817 F.2d at 1528. As noted above, that decision would have required terminating pension plans to pay retirement benefits based on years of service that participants clearly have not, and might never, perform. The decision has been decisively rejected by the Eleventh Circuit sitting *en banc*, 848 F.2d at 1164, and the Respondents themselves admit that they would have had no claim to their early retirement benefits had their situation been closer to the one in that case, Respondents' Brief in Opposition to Petition for a Writ of Certiorari at 11. Furthermore, since the *Blessitt* situation raises legal and factual issues not present in *Tilley*, a decision affecting the Eleventh Circuit's final holding would be entirely inappropriate at this time.

CONCLUSION

The Court should reverse the Fourth Circuit's decision in *Tilley* and find that ERISA § 4044(a)(6) is limited to accrued benefits under the plan, and that Respondents' subsidized early retirement benefits are in no sense accrued benefits under this provision.

Respectfully submitted,

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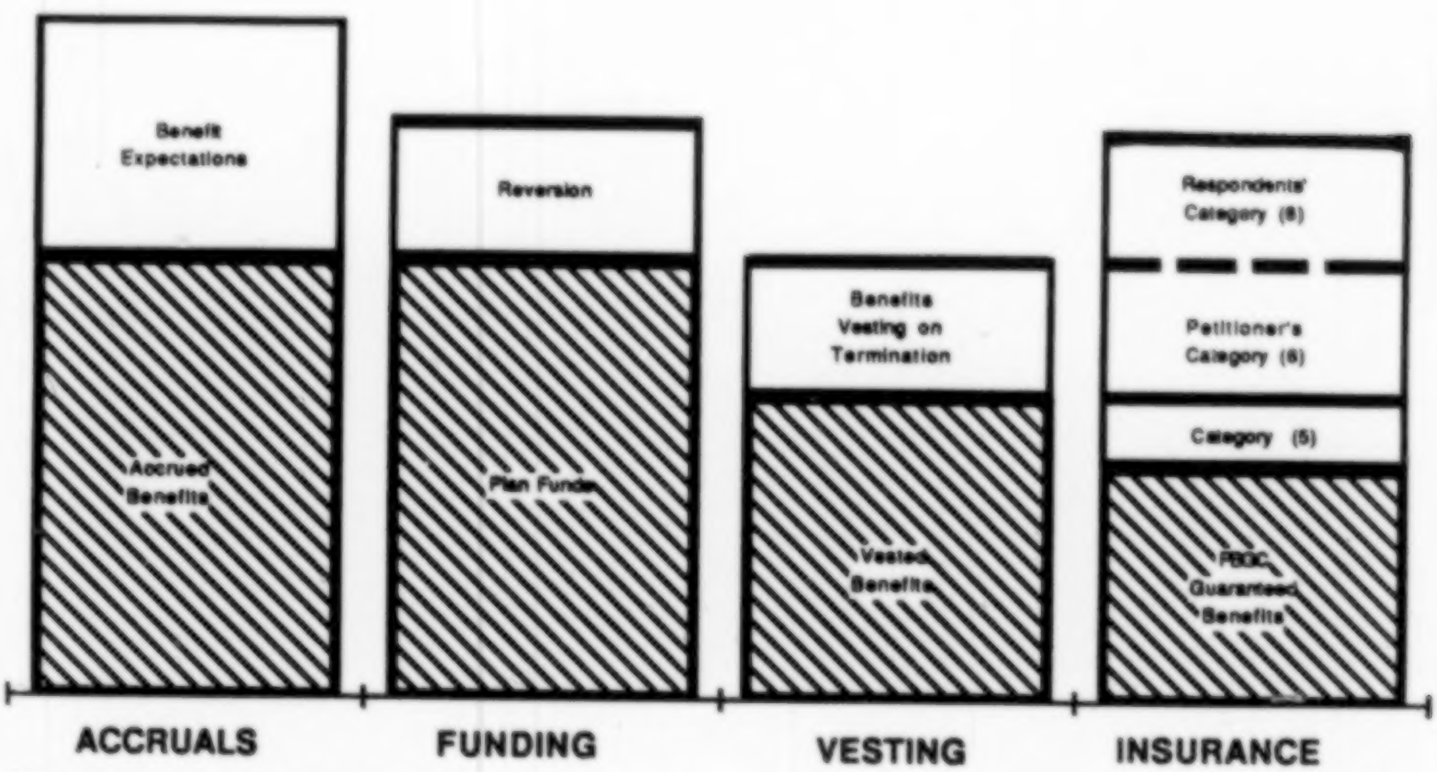
TABLE I



*Not necessarily to scale. The record is inadequate to determine the actual level of early retirement benefits or benefit expectations for all participants.

TABLE II

ALL COMPLETED REVERSION CASES AS OF JUNE 30, 1987

Termination Year	# of Plans	# of Partic	– In Millions of Dollars – Assets	Benefits	Reversion
1980	9	22,242	$58.5	$40.0	$18.5
1981	35	30,512	$341.5	$183.0	$158.5
1982	82	123,587	$1,136.8	$732.9	$403.9
1983	165	167,030	$3,414.1	$1,811.7	$1,602.4
1984	331	384,882	$7,444.9	$3,869.6	$3,575.3
1985	577	668,721	$13,803.7	$8,056.9	$5,746.8
1986	239	238,976	$8,396.1	4,312.2	$4,083.9
1987	49	51,503	$1,215.1	$747.3	$467.8
Grand Totals	1,487	1,687,453	$35,810.7	$19,753.6	$16,057.1

November 8, 1988

The Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Mead Corporation v.
B.E. Tilley, et al.
No. 87-1868

Dear Mr. Spaniol:

Pursuant to Supreme Court Rule 36.2, all parties to this case hereby consent to the filing of amicus curiae briefs by the following interested organizations in support of Petitioner, The Mead Corporation ("Mead"): (1) The Pension Benefit Guaranty Corporation; (2) The American Society of Pension Actuaries; (3) The American Academy of Actuaries; (4) The American Paper Institute, Inc.; (5) The Chamber of Commerce of the United States; (6) The National Employee Benefits Institute; and (7) The Association of Private Pension Welfare Plans.

Counsel for Respondents does not know at this time whether any amici intend to file briefs in support of Respondents. The parties will furnish a second consent letter enumerating such amici at a later date.

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AMICUS CURIAE

BRIEF

(18)

No. 87-1868

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE MEAD CORPORATION,

Petitioner,

—v.—

B.E. TILLEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN PAPER INSTITUTE, INC. IN SUPPORT OF PETITIONER

American Paper Institute, Inc. ("API") submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of The Mead Corporation ("Mead"), petitioner in No. 87-1868, having obtained the written consent of both the petitioner and the respondents to file same.

INTEREST OF THE AMICUS CURIAE

API is the national trade association of the pulp, paper and paperboard manufacturing industry. The approximately 170 member companies of API produce more than 90% of the pulp, paper and paperboard manufactured in the United States. API respectfully submits this brief *amicus curiae* to urge the

Supreme Court to reverse the decision of the Court of Appeals for the Fourth Circuit. The latter Court held incorrectly that Section 4044(a) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1001 *et seq.*, requires terminating defined benefit pension plans to pay unearned early retirement benefits before any assets may revert to the sponsoring employer. API is interested in this action because most of its members sponsor at least one defined benefit pension plan. Many of these plans provide some form of early retirement benefit. The Fourth Circuit's decision, if allowed to stand, will have deleterious effects throughout the paper industry, as well as other industries, by discouraging the establishment and secure funding of defined benefit pension plans and the provision of early retirement benefits.

ARGUMENT

I

THE FOURTH CIRCUIT INCORRECTLY INTERPRETED SECTION 4044(a) OF ERISA TO REQUIRE A TERMINATING PLAN TO ALLOCATE ASSETS FOR UNEARNED EARLY RETIREMENT BENEFITS

A. The Legislative History of ERISA Supports the Conclusion that Section 4044(a) Does Not Require a Terminating Plan to Allocate Assets for Unearned Early Retirement Benefits

Section 4041(b)(3)(A) of ERISA requires the plan administrator of a terminating single-employer pension plan to distribute the assets of the plan in accordance with Section 4044 of ERISA. 29 U.S.C. § 1341(b)(3)(A). Section 4044(a) provides for the allocation of plan assets among six categories of benefits in a specified priority. 29 U.S.C. § 1344(a).[1] If assets exceed the

1 Section 4044(a) provides:

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to pay benefits) among the participants and beneficiaries of the plan in the following order:

(footnote cont'd on following page)

benefits in the first category, they are applied to the second, and so on. Residual assets remaining after satisfaction of all liabilities to participants and beneficiaries may be distributed to the

(footnote cont'd from previous page)

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022B(a)), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(5) did not apply.

For purposes of this paragraph, section 4021 shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

29 U.S.C. § 1344(a).

employer if the plan provides for such a distribution. Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1).

In *Tilley* v. *Mead Corp.*, 815 F.2d 989 (1987), *reh'g denied*, No. 86-3858 (4th Cir. Feb. 17, 1988), the Fourth Circuit held that Section 4044(a)(6) ("Category 6") requires a plan to allocate assets to unearned early retirement benefits. Relying on dictum in *Amato* v. *Western Union International, Inc.*, 773 F.2d 1402, 1416 (2d Cir. 1985), *cert. dismissed per stipulation*, 474 U.S. 1113 (1986),[2] the Fourth Circuit concluded that the language of Category 6, "all other benefits of the plan," was not limited to earned, or accrued, benefits.

The *Amato* court stated that the appellants, participants in a defined benefit pension plan, would be entitled, upon partial termination of the plan, to early retirement benefits regardless whether such benefits were earned, because Category 6 provides for allocation of "all other benefits under the plan," not "all other accrued benefits." 773 F.2d at 1415. In a perfunctory review of Section 4044(a)'s legislative history, the Second Circuit focused only on the omission of the word "accrued" from Category 6 and incorrectly interpreted that omission as Congress' intent to include unearned benefits in that category.

The legislative history of ERISA reveals that while Congress required the allocation of assets to certain benefits which were not accrued benefits (*i.e.*, benefits payable only upon plan termination), it did not intend to allocate assets to benefits which had not yet been earned. The distinction between benefits which are not accrued and unearned benefits is one which the *Amato* court failed to recognize.

2 In *Amato*, plan participants asserted, *inter alia*, that a plan amendment which reduced early retirement benefits caused a partial termination of the plan. The Second Circuit, in reviewing the dismissal of certain counts of the complaint by the district court, remanded the case to the district court for a determination of whether a partial termination had occurred under the tax law. The Second Circuit noted, in dictum, that if a partial termination had occurred, participants would be entitled under Section 4044(a)(6) to unearned early retirement benefits. 773 F.2d at 1415-16.

In the case of a defined benefit plan, the term "accrued benefit" is defined as "the individual's accrued benefit determined under the plan and, . . . expressed in the form of an annual benefit commencing at normal age, ..." Section 3(23)(A) of ERISA, 29 U.S.C. § 1002(23)(A). Congress provided some guidance as to what this definition means:

> [T]he accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age . . . . The committee believes it is desirable not to discourage early retirement plans, accordingly the accrued benefit computation shall be made, for the purposes of the bill, only with regard to the benefit payable at the normal or regular retirement age. The value of any benefit payable under a plan prior to that age may be disregarded.

Report of the House Comm. on Educ. and Labor (Proposing an amendment to H.R. 2 in the form of a substitute bill, H.R. 12906, which contained a provision identical to the Internal Revenue Code § 411(c)(3) as ultimately enacted by ERISA) *reprinted in* 2 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (hereinafter cited as "Legislative History") 3328-29 (1976). *See also* H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* 2 Legislative History at 3115, 3180.

The Internal Revenue Service (the "IRS") distinguishes between accrued benefits and early retirement benefits. The IRS defines the term "accrued benefit" to mean, in the case of a defined benefit pension plan, the benefit commencing at normal retirement age. 26 C.F.R. § 1.411(a)-7(a)(1). The IRS specifically states in its regulations that the accrued benefit does not include a subsidized early retirement benefit. *Id.*

Section 4044(a) is a combination of the allocation provisions of the House and Senate versions of ERISA, neither of which

required the allocation of plan assets to unearned benefits.[3] *See Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1178-79 (11th Cir. 1988) (*en banc*). The House and Senate versions of ERISA were consistent with pre-ERISA law, which required a plan to provide only benefits "accrued up to the time of termination." Rev. Rul. 71-152, 1971-1 C.B. 126, *revoked and restated by* Rev. Rul. 83-52, 1983-1 C.B. 87 (restating the same position after the passage of ERISA), *superseded by* Rev. Rul. 85-6, 1985-1 C.B. 133 (restating the same position after the passage of The Retirement Equity Act of 1984 ("REA")).[4]

The Senate bill set forth four categories of benefits to which assets should be allocated in succession: (1) voluntary employee contributions, (2) mandatory employee contributions, (3) benefits in pay status at least three years, and (4) all other guaranteed benefits. H.R. 2, as passed by the Senate on March 4, 1974, 93d Cong., 2d Sess. § 444 (1974), *reprinted in* 3 Legislative History, *supra* p. 5, at 3599, 3720-22.

The House version had seven categories of benefits, the first three of which included those benefits covered by the Senate version plus all other nonforfeitable benefits. The fourth category of the House version provided for other accrued benefits, the fifth category included interest on employee contributions, and the sixth category consisted of any liabilities payable under the terms of the plan only upon termination. The seventh category permitted remaining assets to be distributed "as provided in the plan." If the plan did not specifically provide for distribution of remaining assets, such assets were to be distributed pro rata to those persons entitled to receive a distribution under the first six categories. H.R. 2, as passed by the House on March 6, 1974, 93d Cong., 2d Sess. § 112 (1974), *reprinted in* 3 Legislative History, *supra* p. 5, at 3898, 3956-61. *See* H. Conf.

3 One category of benefits under the House version provided for the allocation of assets to interest on employee contributions. This category was enacted separately as ERISA § 4044(d)(2).

4 The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of Titles 26 and 29 of the United States Code), discussed *infra* at 11-13.

Rep. No. 1280, 93d Cong., 2d Sess. 375 (1974), *reprinted in* 3 Legislative History, *supra* p. 5, at 4277, 4642 (hereinafter cited as "Committee Report").

The Conference Committee version of the allocation provision, which Congress ultimately enacted, combined into six categories the priority categories of the House and Senate versions. *See* Committee Report, *supra*, at 375. In its opinion in *Amato*, the Second Circuit concluded that the Conference Committee, by omitting the word "accrued" from Category 6, meant to include unearned benefits in that category. Citing the Committee Report, the *Amato* court stated:

> The House version of the bill included among the benefits for which funds had to be allocated a category entitled "other accrued benefits." The Conference rejected this version and substituted "all other benefits under the Plan", the language of the present statute. Congress thus decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefit expectations based upon the Plan's full benefit structure.

773 F.2d at 1416 (citation omitted).

Contrary to the Second Circuit's opinion, the Conference Committee did not "reject" the House version with its category "other accrued benefits." Instead, the Conference Committee combined the benefits in the fourth (other accrued benefits) and sixth (plan termination benefits) categories of the House version into Category 6, "all other benefits under the plan." The Conference Committee did not use the term "accrued" because Category 6 includes not only the accrued benefits of the fourth category of the House version but the plan termination benefits of the sixth category. The Second Circuit failed to recognize that, by omitting the word "accrued," the Conference Committee followed the intent of the House and Senate versions to limit benefits received on plan termination to those benefits earned under the terms of the plan. Category 6 was not meant to, and does not, include unearned benefits.

Not only is the Second Circuit's interpretation of the omission of the term "accrued" incorrect, it violates a basic rule of statutory construction. Unexplained changes made in committee are not reliable indicators of legislative intent. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947); *Drummond Coal Co.* v. *Watt*, 735 F.2d 469, 474 (11th Cir. 1984). In the Committee Report, the Conference Committee discussed fully those areas in which ERISA altered prior law or where the final version of the statute differed from predecessor bills.[5] Nowhere in its report does the Conference Committee state that Section 4044(a) expanded a terminated plan's liabilities beyond those required by pre-ERISA law, or that the Conference bill added unearned benefits, which had not been included in either the House or Senate versions, to Category 6. Such a drastic change in the law would have merited some discussion in the Committee Report or the remainder of ERISA's voluminous legislative history. *See Blessitt*, 848 F.2d at 1177.

In support of its interpretation of Section 4044(a), the *Amato* court also cited the Pension Benefit Guaranty Corporation ("PBGC") regulation. The regulation states:

> The benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable.

29 C.F.R. § 2618.16.

In the preamble to the proposed version of its regulation, the PBGC explained that Category 6 "contains all plan benefits with respect to a participant not assigned to priority categories 1 through 5. Thus, priority category 6 will contain the value of accrued forfeitable benefits of a participant." Preamble to Allocation of Assets: Proposed Determination of Payable Benefits, 40 Fed. Reg. 51,368, 51,370 (Nov. 4, 1975). The *Amato* court reasoned that because the PBGC did not state explicitly that Category 6 included only accrued benefits, those benefits

5 *See, e.g.*, the discussions of vesting, Committee Report, *supra* p. 7, at 268-82; prohibited transactions, *id.* at 306-23; and salary reduction plans, *id.* at 355-56. The legislative history contains more than 5,000 pages.

were merely "among" the benefits in Category 6. 773 F.2d at 1414. The PBGC, however, has never interpreted Section 4044(a)(6) or its regulation to require terminating plans to pay unearned benefits. *See* Brief of Amicus Curiae PBGC in Support of [Mead's] Petition for Rehearing and Suggestion of Rehearing En Banc (hereinafter cited as "PBGC Brief") at 12-13 and n.10, *Tilley* v. *Mead*; PBGC Opinion Letter 87-11 (Oct. 22, 1987); PBGC Opinion Letter 86-1 (Jan. 15, 1986). *See also* PBGC Opinion Letter 86-5 (Mar. 6, 1986); PBGC Opinion Letter 85-28 (Dec. 2, 1985); PBGC Opinion Letter 85-9 (Apr. 5, 1985).

There is a dearth of analysis in the *Tilley* opinion with respect to the legislative history and the PBGC regulation.[6] To support its holding that Section 4044(a)(6) requires the Mead Plan to pay the former Mead employees unearned early retirement benefits, the Fourth Circuit seems to have relied completely on the Second Circuit's analysis of Section 4044(a) in *Amato*. Because the Fourth Circuit's decision in *Tilley* is based on the Second Circuit's erroneous interpretation of Section 4044(a)(6), it should be reversed.

B. Section 4044(a) Does Not Create Any Substantive Rights to Unearned Early Retirement Benefits

Section 4044 was enacted primarily "[t]o protect against evasion of the . . . limits on [PBGC] insurance benefits by use of pension fund assets to first pay uninsured benefits." S. Rep. No. 383, 93d Cong., 1st Sess. 84 (1973), *reprinted in* 1 Legislative History, *supra* p. 5, 1063, 1152. Section 4044(a) is merely a marshalling provision which ensures that plan assets are used first to pay benefits insured by the PBGC under Section 4022 of ERISA. *Ashenbaugh* v. *Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1529 (3d Cir. 1988).

In *Ashenbaugh*, participants in a single-employer defined benefit pension plan sought unearned early retirement benefits after a plant shutdown resulted in a partial termination of

6 The Fourth Circuit incorrectly attributed the regulation to the Treasury Department. 815 F.2d at 992.

the sponsor's plan. The plan provided, *inter alia*, an early retirement benefit similar to the one in the present case.[7]

One hundred and forty-five employees of the closed plant brought suit[8] claiming, *inter alia*, that participants who had completed fewer than thirty years of service, or who had thirty years of service but had not reached age 62, were entitled to a portion of the plan's early retirement benefit. 854 F.2d at 1521. The employees relied upon *Amato*, the Fourth Circuit decision below, and the Eleventh Circuit panel decision in *Blessitt*.[9] They argued that under *Amato* the early retirement benefit was an accrued benefit which vested upon the partial termination of the plan. *Id.* They also argued, as did the former Mead employees below, that *Amato* created a substantive right to receive early retirement benefits upon plan termination. *Id.*

The district court rejected the employees' claims. On appeal, the Third Circuit, in a 2-1 decision, affirmed. The majority opinion stated that "plaintiffs' argument not only misconstrues . . . the relevant law, but misperceives [its] purposes as well." *Id.* at 1523. The Third Circuit rejected the employees' claim that Section 4044 created a substantive right to receive benefits under a plan. The court held:

> We . . . disagree with *Amato*, and affirm the district court's holding in this case that ERISA § 4044 is an ordering provision rather than one that creates substantive rights. . . . *Amato* held that [§ 4044(a)(6)] entitled participants of a fully-funded plan to receive contingent benefits even though the specified contingencies had not occurred. . . . The Fourth Circuit has followed *Amato*'s

7 A participant who had 30 years of service and was 62 or over could retire and receive an unreduced normal retirement benefit.

8 *Ashenbaugh* is not a class action. However, a follow-on class action involving an additional 280 employees also is pending. *Nobers* v. *Crucible Inc. 1975 Salaried Retirement Plan*, No. 88-1237 (W.D. Pa. filed May 31, 1988).

9 817 F.2d 1528 (1987), *vacated* and *reh'g en banc granted*, 836 F.2d 1571 (11th Cir. 1988). *Blessitt* is discussed *infra* at 14-15.

> interpretation of [§ 4044(a)(6)], in *Tilley* v. *Mead Corp.*, 815 F.2d 989 (4th Cir. 1987).

854 F.2d at 1528. (footnote and citations omitted).

The Third Circuit also rejected the employees' claim that early retirement benefits were accrued benefits. *Id.* at 1525-26. The Third Circuit stated that even assuming, *arguendo*, the early retirement benefits at issue were "accrued benefits," the employees would not be entitled to receive them because they had not met the requirements for the benefits under the plan. *Id.* at 1524. The Third Circuit rejected the employees' argument that the plan provisions should not be enforced because the plant closing prevented them from fulfilling those requirements. The Court said the plan's fiduciaries were not authorized to disregard the express provisions of the plan. *Id.* at 1529.

Section 4044(a) does not create any substantive right to benefits. It does not entitle participants to receive benefits for which they have not fulfilled the requirements under the express terms of the plan. *Ashenbaugh*, 854 F.2d at 1528-29. *See Blessitt*, 848 F.2d at 1169; 29 C.F.R. § 2613.5(a)(3). At the time the Mead Plan terminated, the respondents had not satisfied the requirements under the Mead Plan for unreduced early retirement benefits.

C. The Legislative History of The Retirement Equity Act of 1984 Further Supports Mead's Interpretation of Section 4044(a)

Congress has amended ERISA several times since 1974. These amendments have continued to permit asset reversions to employers while generally providing more protection for participants of private pension plans and imposing additional obligations upon employers that terminate such plans.[10] 29 C.F.R. § 2613.5(a)(3).

10 *See* REA, *supra* n.4; Single Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Consolidated Omnibus Budget

(footnote cont'd on following page)

REA was intended to strengthen ERISA's protection of retirement benefits. S. Rep. No. 575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547 (hereinafter cited as "Senate Report"). REA specifically provides that early retirement provisions cannot be reduced by plan amendment or eliminated by plan termination. ERISA § 204(g), 29 U.S.C. § 1054(g). When a plan is terminated under circumstances in which employment with the plan sponsor continues, REA provides participants the opportunity to earn early retirement benefits after the termination date. Participants, however, receive the early retirement benefits only upon fulfilling the requirements for those benefits under the plan. Senate Report, *supra*, at 28, 31.

Under REA, if a participant's employment is severed before the participant has met the plan's service and age requirements for unreduced early retirement benefits, the participant will be unable to fulfill those requirements and will not be entitled to those benefits. *Id.* at 29. If REA had been in effect at the time of the Mead Plan termination and if respondents continued to be employed by Mead, the respondents who later met the service and the age requirements for the unreduced early retirement benefit would be entitled to receive the unreduced early retirement benefit when they reached age sixty-two.[11]

The Fourth Circuit's decision, which gives respondents greater benefits than those they would be entitled to under REA, cannot be correct unless REA, in fact, reduced participants' rights. If, as the Fourth Circuit concluded, the law in effect prior to REA required terminating plans to pay *unearned*

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Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 222 (1986); Tax Reform Act of 1986, Pub. L. No. 99-514, § 1132(a), 100 Stat. 2936 (1986); Pension Protection Act, enacted as Title IX, Subtitle D, Part II of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

11 Such benefit would be calculated based on the participant's years of service at the time the Mead Plan terminated. Senate Report, *supra*, at 28.

early retirement benefits at termination, Congress would not have found it necessary to provide, through REA, for the payment of future *earned* early retirement benefits. *See* IRS Gen. Couns. Mem. 39665 (Sept. 25, 1987).

II

THE PBGC'S AND IRS' INTERPRETATIONS OF SECTION 4044(a) ARE ENTITLED TO GREAT DEFERENCE

The Fourth Circuit's decision in *Tilley*, is contrary to the longstanding interpretation of the termination provisions of ERISA and will lead to confusion and uncertainty in the administration of pension plan terminations. ERISA is the comprehensive remedial statute enacted to protect the pension benefits of participants and beneficiaries. *See Nachman* v. *PBGC*, 446 U.S. 359, 361, *reh'g denied*, 448 U.S. 908 (1980). The PBGC, pursuant to Title IV of ERISA, and the IRS, pursuant to Title II of ERISA, administer the terminations of qualified defined benefit pension plans. Prior to termination, a defined benefit pension plan must submit its plan of termination to the PBGC together with an actuary's certification that the plan assets are sufficient to pay all benefits required under the plan. Section 4041(a) of ERISA, 29 U.S.C. § 1341(a).[12] Most qualified pension plans also are submitted to the IRS for a determination that all benefit liabilities required under the plan were satisfied.[13] The PBGC issued a "Notice of Sufficiency" and the IRS issued a favorable determination in connection with the Mead Plan's termination. *See* Apps. H and G to Mead's Petition for a

12 At the time of the Mead Plan termination, pension plans were required to obtain a "Notice of Sufficiency" from the PBGC before plan assets could be distributed. ERISA § 4041(a), 29 U.S.C. § 1341(a) (1983).

13 A favorable determination upon plan termination is important because, for example, only distributions from plans that are qualified at the time of termination may be "rolled over" by participants into individual retirement accounts under IRC § 402(a)(5), 26 U.S.C. § 402(a)(5), thus deferring taxation, or may be afforded special income averaging treatment under IRC § 402(e), 26 U.S.C. § 402(e).

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The PBGC and the IRS are the government agencies charged with the administration of plan terminations. Their opinions, therefore, are entitled to great deference and should be followed where, as here, they are consistent with Congressional intent. *Bob Jones University* v. *United States*, 461 U.S. 574, 596-97 (1983); *Nachman Corp.*, 446 U.S. at 373-74; *Blessitt*, 848 F.2d at 1172 n.19. *See Belland* v. *PBGC*, 726 F.2d 839, 843 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984) (PBGC's interpretation of ERISA entitled to great deference); *Connolly* v. *PBGC*, 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979) (PBGC's opinion entitled to great deference in the construction and application of ERISA).

The PBGC and the IRS consistently have interpreted and administered ERISA to require that only benefits earned under the terms of a plan be paid upon termination. PBGC Brief, *supra* p. 9, at 12. *See* PBGC Opinion Letter 87-11; PBGC Opinion Letter 86-5; PBGC Opinion Letter 86-1; PBGC Opinion Letter 85-28; PBGC Opinion Letter 85-9; IRS Gen. Couns. Mem. 39665 at 2-3; Rev. Rul. 71-152, 1971-1 C.B. 126, *revoked and restated by* Rev. Rul. 83-52, 1983-1 C.B. 87 (restating the same position after the passage of ERISA), *superseded by* Rev. Rul. 85-6, 1985-1 C.B. 133 (restating the same position after the passage of REA). Contrary to the opinion of the PBGC and the IRS, the Fourth Circuit held that Section 4044(a)(6) of ERISA requires plans to "meet participants' benefit expectations" by paying unearned early retirement benefits before any remaining plan assets may revert to the employer. 815 F.2d at 992 (citing *Amato*, 773 F.2d at 1416).

Initially, in *Blessitt*, a panel of the Court of Appeals for the Eleventh Circuit construed Section 4044(a)(6) to require plans to pay all "benefits promised under the plan but not yet accrued" before any assets may revert to the employer. 817 F.2d at 1531. Subsequent to the appellate panel decisions in *Tilley* and *Blessitt*, the PBGC and the IRS issued opinions stating that "benefit expectations" are not liabilities which must be

satisfied prior to reversion of assets. IRS Gen. Couns. Mem. 39665 at 4-5. *See* PBGC Opinion Letter 87-11.

On rehearing *en banc* in *Blessitt*, the Eleventh Circuit held that participants are not entitled to unearned normal retirement benefits upon plan termination. In its opinion, the Eleventh Circuit accorded great deference to the PBGC's and IRS' interpretations of the termination provisions. *See* 848 F.2d at 1167-68, 1171-72 and n.19. In *Ashenbaugh*, the Third Circuit gave similar deference to the PBGC's and IRS' interpretation of Section 4044(a). *See* 854 F.2d at 1525, 1529.

III

THE FOURTH CIRCUIT'S DECISION SERIOUSLY JEOPARDIZES THE STABILITY OF THE PRIVATE PENSION SYSTEM

A. The Fourth Circuit's Decision Gives Participants a Windfall Not Intended by Congress

The Fourth Circuit held that assets should be allocated to meet participants "benefit expectations." The Fourth Circuit, however, failed to recognize that participants reasonably can expect to receive only those benefits to which they are entitled under the terms of the pension plan. One of Congress' primary purposes in enacting ERISA was to prevent the loss of vested benefits when pension plans terminated.[14] Congress found that

---

14 *See, e.g.*, the following statement of Senator Williams, a sponsor of the Senate version of ERISA:

> [A] basic goal [of the Senate version] is to assure workers that they will receive the promised pension benefits earned for their retirement during their working lives.
>
> * * *
>
> For too long and for too many workers, the promise of pension benefits upon retirement has been an illusion and indeed, a hoax.
>
> While there can be no doubt that our private pension system has well served the needs of many workers, our study found that for countless others, the expectation of retirement benefits has proven to be built on sand.

(footnote cont'd on following page)

the termination of plans before requisite funds have been accumulated deprived employees of anticipated benefits. Section 2(a) of ERISA, 29 U.S.C. § 1001(a). "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.*, 446 U.S. at 375.

Congress intended to allocate to participants of terminating plans only those benefits which they have earned during their years of service with employers and which they reasonably expect to receive in return for that service. To hold that "benefit expectations" includes unearned benefits for which participants have not provided any services is to give participants a windfall not intended by Congress.

B. The Fourth Circuit's Decision Discourages the Establishment and Secure Funding of Defined Benefit Pension Plans and the Provision of Early Retirement Benefits

By effectively eliminating asset reversions, the Fourth Circuit's decision discourages the establishment of defined benefit pension plans. In defined benefit plans, the employer assumes responsibility for funding the plan sufficiently to pay benefits as they become due. Defined contribution plans do not promise

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This was the experience, for example, of Stephen Duane, who worked for 32 years at an A. & P. warehouse in Jersey City.

> Because this warehouse was shutdown [sic] when Mr. Duane was 4 years short of the company's minimum pension age, he received no retirement benefits whatever despite his long years of service.
>
> * * *
>
> Indeed, two-thirds of all pension plan participants at this moment have no vested right in their plan.
>
> As a result, losses of pension expectations can befall employees in wholesale fashion.

Senate Floor Debate on S. 4, 2 Legislative History, *supra* p. 5, at 1579, 1599 (1976). *See also* S. Rep. No. 383, 93d Cong., 1st Sess. 78 (1973), *reprinted in* 1 Legislative History, *supra* p. 5, at 1063, 1146.

stated benefits. Instead, the employer contributes an amount specified in the plan for each participant. Participants share in any investment gains of the plan and bear all investment losses. Each participant's accrued benefit equals his share of the employer's contribution, plus or minus the investment experience of the plan.

To permit ERISA to be construed to allow participants in a defined benefit plan to receive unearned benefits would thwart the purpose of defined benefit plans. If employers maintaining such plans must pay benefits in excess of those defined in the plan, they will have no incentive to establish defined benefit plans and assume the risk inherent in funding such plans. Instead, they will establish defined contribution plans and place the investment risk on the participants.

For those employers who are willing to accept the risk of establishing defined benefit pension plans, the Fourth Circuit's decision may discourage them from providing early retirement benefits. The employers thus avoid the possibility that they may be required to pay substantial unearned early retirement benefits upon termination of the plan. The Fourth Circuit's decision would affect adversely the participants Congress intended ERISA to protect. Section 2(c) of ERISA, 29 U.S.C. § 1001(c).

The Fourth Circuit's decision also provides a disincentive for employers to fund in advance future accruals and liabilities, effectively undermining ERISA's policy to protect pension benefits. If plans are required to pay "benefit expectations," employers may be encouraged to use actuarial methods and assumptions so as to provide only the minimum funding required by law. Plans will be funded less securely, threatening the stability of the plan termination insurance system. *See Blessitt*, 848 F.2d at 1177.

CONCLUSION

Based on the foregoing reasons, this Court should reverse the decision of the Fourth Circuit and hold that Section 4044(a) does not require a terminating defined benefit pension plan to pay unearned early retirement benefits prior to a reversion of assets to the sponsoring employer.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(19)

No. 87-1868

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE MEAD CORPORATION,
Petitioner,
v.

B.E. TILLEY, DAVID H. WALL, WILLIAM L. CROTTS, CHRISLEY H. REED, J.C. WEDDLE, WILLIAM D. GOODE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether Section 4044(a)(6) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1344(a)(6), requires the administrators of terminated defined benefit pension plans to pay plan participants amounts in excess of the benefits they have accrued under the terms of the plan as of the date of plan termination before any residual assets may revert to the employer pursuant to Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1).

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BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States government corporation established by Section 4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302, to administer and enforce the provisions of Title IV of the statute. 29 U.S.C. § 1301, *et seq.* Title IV governs the termination of defined benefit pension plans. It includes the single-employer pension plan termination insurance program, which covers over 30 million partici-

pants in more than 110,000 defined benefit pension plans voluntarily established by employers in the private sector.

The PBGC is authorized and required to issue such "rules and regulations as may be necessary to carry out the purposes of [Title IV]." 29 U.S.C. § 1302(c)(3). Pursuant to this authority, the PBGC has issued regulations, at 29 C.F.R. pt. 2618 (1987), interpreting Section 4044 of ERISA, 29 U.S.C. § 1344. Section 4044 is a key provision of Title IV governing the distribution of plan assets at plan termination. Subsection (a) establishes the order of priority for allocating plan assets among participants and beneficiaries. 29 U.S.C. § 1344(a). Subsection (d)(1) permits the employer that maintained the plan before termination to recover residual assets, if any, after all liabilities of the plan have been satisfied. 29 U.S.C. § 1344(d)(1).

The United States Court of Appeals for the Fourth Circuit decided that Section 4044(a) includes, as liabilities that must be satisfied before an employer may recover residual plan assets, benefits not yet accrued by participants under the terms of the plan at the time of plan termination. This decision is contrary to PBGC's long-standing interpretation of Section 4044(a), and to the established practice of the professional pension community. Moreover, the decision of the Fourth Circuit discourages the establishment of new defined benefit pension plans at the same time that it encourages the minimal funding of existing plans, contrary to the Title IV purposes Congress instructed the PBGC to carry out. 29 U.S.C. § 1302(a).

The decision of the Fourth Circuit penalizes employers that overfund their defined benefit plans, out of an abundance of caution or as a result of actuarial error, by imposing substantial unanticipated liabilities for benefits not yet earned by their employees. To avoid these liabilities, employers may decide not to establish new defined

benefit pension plans. Congress, however, intended to encourage the continuation and maintenance of voluntary defined benefit pension plans for the benefit of their participants. 29 U.S.C. § 1302(a)(1). Contrary to this intent, the Fourth Circuit's decision induces employers to fund their existing defined benefit pension plans to the minimal extent permitted by law. Such funding practices are inimical to the long-term interests of the millions of plan participants and beneficiaries that ERISA was enacted to protect, and to the PBGC's interest in maintaining a viable pension insurance program.

If plan assets are insufficient at termination to pay the benefits guaranteed under Title IV, the PBGC is required to pay those benefits from its insurance funds. 29 U.S.C. § 1322. The employer is liable to the PBGC under Section 4062 of ERISA for some or all of the unfunded guaranteed benefits, depending on the date of plan termination. 29 U.S.C. § 1362.[1] The PBGC, however, does not realize full recovery in every case. The pension insurance program therefore bears the risk of loss whenever an employer fails to fund its pension promises fully. The decision of the Fourth Circuit increases this risk insofar as it encourages minimal funding of defined benefit pension plans.

---

[1] ERISA initially limited an employer's liability under Section 4062 to 30 percent of the employer's net worth. 29 U.S.C. § 1362(b) (Supp. IV 1986). Section 4062 was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 (April 7, 1986), which generally increased the employer's liability to 75 percent of the plan's insufficiency for guaranteed benefits, regardless of the employer's net worth. 29 U.S.C.A. § 1362(b) (West Supp. 1987). A more recent amendment, made by the Pension Protection Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (Dec. 22, 1987), increased an employer's liability to the PBGC to the total amount of the plan's unfunded benefit liabilities as of the termination date.

STATEMENT OF THE CASE

Petitioner, The Mead Corporation ("Mead"), established the Mead Industrial Products Salaried Retirement Plan (the "Plan") to cover employees at the Lynchburg Foundry Company (the "Foundry"), a wholly-owned subsidiary of Mead. Respondents, B.E. Tilley, David H. Wall, William L. Crotts, Chrisley H. Reed, J.C. Weddle, and William D. Goode, are former employees of the Foundry and participants in the Plan. The Plan was terminated on August 1, 1983, after Mead sold the Foundry to another corporation. (J.A. 7, 95.) [2]

The Plan is a defined benefit plan that was funded entirely by employer contributions. Under the Plan, a participant attains a vested right to a benefit after completing at least 10 years of service. (J.A. 30.) The Plan then provides benefits calculated with reference to a participant's age, earnings, and years of service at retirement or other termination of employment. (J.A. 36-41.) Normal retirement benefits are payable at the normal retirement age of 65. (J.A. 36-37.) The Plan also provides early retirement benefits to participants who attain age 55, calculated in the same manner as normal retirement benefits, but actuarially reduced by five percent for each year by which a participant's early retirement precedes his normal retirement date. (J.A. 37, 38.) Under Article V, Section 2 of the Plan, however, a participant who completes 30 years of service and elects to retire on or after attaining age 62 is entitled to an unreduced early retirement benefit, *i.e.*, an early retirement benefit in an amount equal to the benefit normally payable at age 65, without actuarial reduction. (J.A. 39.)

Pursuant to Article V, Section 2 of the Plan, Mead paid unreduced early retirement benefits to all employees

[2] "J.A." refers to the Joint Appendix filed with the Petitioner's brief. "Pet. App." references are to the Appendix to the Petition for Certiorari.

who met both the age and service requirements on the date of plan termination. Respondents, however, did not meet those requirements. Crotts had not completed 30 years of service at the date of Plan termination, and neither he nor any other respondent had then attained age 62. (Pet. App. 3a.) Respondents, moreover, elected to receive their benefits in lump sum form, rather than as annuities. Accordingly, each respondent received a lump sum payment equal to the present value, determined as of the date of distribution, of the normal form of benefit to which he was entitled under the terms of the plan at normal retirement age. (*Id.*) The $10 million that remained after the payment of these and all other benefits under the Plan reverted to Mead, pursuant to Article XIII, Section 4(f) of the Plan. (J.A. 63; Pet. App. 3a.)

In 1984, respondents filed suit in the United States District Court for the Western District of Virginia, seeking "to obtain an increase in the amount or level of the[ir] lump-sum benefits." (Pet. App. 11a.) Respondents alleged that they were entitled to the immediate payment of unreduced early retirement benefits, notwithstanding their failure to satisfy the Plan's age and service requirements. (J.A. 1-15.) In the alternative, respondents claimed that they were entitled to a pro rata share of the residual assets that reverted to Mead. (J.A. 378.)

The district court concluded that respondents were "not entitled to any additional sums under the plan." (Pet. App. 12a.) It decided that "[t]he Plan's language, the legislative history, and the caselaw in the fourth circuit . . . clearly demonstrate that early retirement benefits are not 'accrued benefits' under ERISA" (Pet. App. 11a), and therefore "were not nonforfeitable" at plan termination. (Pet. App. 12a.) Accordingly, respondents had no right to receive unreduced early retirement benefits at plan termination. (*Id.*)

The district court also rejected respondents' claim for a share of the residual Plan assets that had reverted to Mead. As the court stated, "[s]ince the Plan in question was a defined benefit plan, the participants are not entitled to a share of the trust fund." (Pet. App. 13a.) Rather, "[o]nce the participant's defined benefits have been paid, any surplus from overfunding must be returned to the employer." (*Id.;* citations omitted). In the court's view, this result was supported by "[t]wo sound underlying policies." (*Id.*) "First, ERISA is designed to protect only those benefits which have become vested." (Pet. App. 13a.) It is "not designed to provide participants with a windfall due to the employer's error in overfunding the Plan in an attempt to keep it on a sound financial basis." (*Id.*) Second, "the rule will serve to encourage employers to keep the funds fully funded under ERISA guidelines in that they will not be penalized for overfunding in an 'abundance of caution.'" (*Id.;* citations omitted.)

The Fourth Circuit reversed. Adopting the reasoning of the United States Court of Appeals for the Second Circuit in *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1407-14 (2d Cir.), *cert. dismissed*, 474 U.S. 1113 (1985), the Fourth Circuit held that category six of Section 4044 includes early retirement benefits "even if those benefits were not accrued at the time of termination." (Pet. App. 5a.) Concluding that the "application of category 6 of ERISA § 4044 [w]as controlling" (Pet. App. 7a), the Fourth Circuit found it unnecessary to decide the question whether the unreduced early retirement benefits under the Plan in this case were accrued benefits.[3]

[3] Like the Fourth Circuit, the PBGC expresses no view on the question, arising under Titles I and II of ERISA, whether early retirement benefits are accrued benefits. *Compare Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1526 (3d Cir. 1988); *Bencivenga v. Western Pennsylvania Teamsters and Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir. 1985); *Sutton v. Weirton Steel Division of National Steel Corporation*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust*, 662 F.2d 617, 619-20 (9th Cir. 1981) *with Amato v. Western Union International, Inc.*, 773 F.2d at 1407-14. The United States filed an *amicus curiae* brief in *Amato*, on behalf of the Internal Revenue Service, arguing that early retirement benefits are accrued benefits protected from elimination by plan amendment within the meaning of Section 411(d)(6) of the Internal Revenue Code. That brief did not address Section 4044 of ERISA or that part of the *Amato* decision on which the Fourth Circuit relied in this case. The PBGC did not participate in *Amato*, and its views in this case are limited to Section 4044.

SUMMARY OF ARGUMENT

The Fourth Circuit erred in relying on Section 4044 of ERISA to require the payment of amounts in excess of the benefits to which respondents were entitled under the terms of the Plan on the date of termination. Benefit entitlements are governed by the accrual and vesting provisions in Titles I and II of ERISA and the terms of defined benefit plans. They are not altered or enhanced by Section 4044 at plan termination.

Plan termination stops benefit and vesting accruals and fixes the benefits of participants in defined benefit pension plans. *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1171-72 (11th Cir. 1988) (en banc); *In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 649 (2d Cir. 1983); *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199, 201 (3d Cir. 1983); *Audio Fidelity Corp. v. PBGC*, 624 F.2d 513, 517 (4th Cir. 1980). Section 4044(a) therefore merely provides for the orderly allocation of plan assets to the benefits accrued up to the time of termination. It assigns all plan benefits to one or more of six priority categories, and requires the allocation of available plan assets to each category in succession. "[A]ll . . . benefits under the plan" that are

not included in categories one through five are assigned to priority category six. After all benefits in category six have been provided, Section 4044(d)(1) permits the reversion of residual assets to the employer. *Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 458 (4th Cir. 1987).[4]

Category six is the only category to include forfeitable benefits. It includes benefits accrued but not yet vested under the terms of a plan before plan termination. Category six, however, does not include the mere expectation of benefits not accrued on the date of plan termination and that may never be payable under the plan. The decision of the Fourth Circuit to the contrary cannot be reconciled with the orderly administration of defined benefit pension plans or the policies underlying ERISA.

ARGUMENT

Section 4044(a)(6) Requires The Allocation Of The Assets Of A Terminated Plan Only To Benefits Accrued Under The Terms Of The Plan At The Date Of Plan Termination Or Required To Be Provided By Titles I And II Of ERISA, And Does Not Independently Create Any Benefit Entitlements.

The Fourth Circuit decided that Section 4044(a)(6) of ERISA includes "early retirement benefits, even if those benefits were not accrued at the time of termination." (Pet. App. at 5a.)[5] The court accordingly used

[4] The Plan in this case was funded entirely by Mead, without employee contributions. Accordingly, Section 4044(d)(2), which requires the distribution to the contributors of any assets attributable to employee contributions remaining after all liabilities of the plan to participants and beneficiaries have been satisfied, does not apply.

[5] Section 301(a) of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1450-52 (1984), amended Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and Section 411(d)(6) of the Internal Revenue Code, to require terminating plans to treat early retirement benefits as accrued benefits in some circumstances.

Section 4044(a)(6) to create a right to the immediate payment of unreduced early retirement benefits at Plan termination to participants who did not then, and may never, meet the eligibility conditions set forth in the Plan.[6] Section 4044(a), however, does not create additional benefit entitlements. It merely provides for the orderly distribution of benefits already earned under the terms of a defined benefit plan or otherwise required at termination by other provisions of ERISA.

Section 4044 prescribes rules for distributing the assets of a terminated pension plan to plan participants, and, where appropriate, to their employer. Section

As amended, Titles I and II of ERISA require the payment of early retirement benefits and retirement-type subsidies "with respect to benefits attributable to service before" plan termination. 29 U.S.C. § 1054(g); *see* 26 U.S.C. § 411(d)(6). The Internal Revenue Service has issued guidance in Treas. Reg. § 411(d)-4 concerning the post-REA application of Section 411(d)(6). In the case of a retirement-type subsidy, the requirements in Section 411(d)(6) apply only with respect to participants who satisfy, either before or after plan termination, the pretermination conditions for the subsidy. *Id.* Assets accordingly must be allocated under Section 4044(a) to these benefits. PBGC Opinion Letter 87-11 (Oct. 22, 1987) at 2 n.1. Congress made clear, however, that REA was not intended to "change the liability of the PBGC for guaranteed benefits." S. Rep. No. 98-575, 98th Cong., 2d Sess. 31 (1984).

The REA amendment applies with respect to plans terminating after July 30, 1984. Pub. L. No. 98-397 § 302(d). The amendment accordingly is inapplicable to the Plan, which terminated in 1983. In any event, to the extent that it requires the payment of benefits greater than those required by the terms of the Plan or Titles I and II of ERISA, the decision of the Fourth Circuit goes beyond the REA amendment. *See Ashenbaugh*, 854 F.2d at 1527-28; *Blessitt*, 848 F.2d at 1174-75.

[6] According to the brief of respondents in the court of appeals, respondent David H. Wall died shortly after the initiation of this action, before attaining age 62. It is not known whether respondent Crotts has or will ever meet the 30-year service requirement.

4044(a) establishes the order of priority for allocating plan assets to the benefits of plan participants. All plan benefits are assigned to one or more of six priority categories. The six priority categories range from category one, which has the narrowest scope and highest priority, to category six, which has the broadest scope and lowest priority. The plan administrator must allocate available plan assets to each category in succession, beginning with priority category one. 29 U.S.C. § 1344(a); 29 C.F.R. § 2618.10(d). This process is repeated until all assets are exhausted, or until all benefits in categories one through six have been provided. Residual assets, if any, may then be distributed to the employer if the Plan so provides and the distribution is not otherwise unlawful. 29 U.S.C. § 1344(d)(1). *See* 29 C.F.R. § 2618.30 (1987).

Section 4044 of ERISA was enacted in conjunction with the PBGC's guarantee of certain nonforfeitable benefits under Section 4022 of ERISA. 29 U.S.C. § 1322. Subject to the limitations in Section 4022, the PBGC insures the payment of all nonforfeitable benefits accrued and vested under the terms of a defined benefit plan at the time of plan termination. A "nonforfeitable benefit" is, "with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act . . . ." 29 U.S.C. § 1301(a)(8); 29 C.F.R. § 2618.2. However, for purposes of both the PBGC's guarantee and asset allocation under Section 4044, "benefits that become nonforfeitable solely as a result of the termination of a plan [are] considered forfeitable." 29 C.F.R. §§ 2613.6(b), 2618.2.

The primary purpose of Section 4044 is "[t]o protect against evasion of the . . . limits on the [PBGC's] insurance by use of pension assets first to pay uninsured benefits." S. Rep. No. 383, 93d Cong., 1st Sess. 84 (1973). The nonforfeitable benefits guaranteed by the PBGC therefore are assigned to the first four priority categories. 29 U.S.C. §§ 1344(a)(1)-(a)(4). Section 4044, however, also ensures that nonforfeitable benefits will be paid before forfeitable benefits if plan assets are insufficient to pay both. It assigns nonforfeitable benefits not guaranteed by the PBGC to priority category five, which includes "all other nonforfeitable benefits under the plan," 29 U.S.C. § 1344(a)(5).[7] "[A]ll other benefits under the plan" are assigned to priority category six. 29 U.S.C. § 1344(a)(6).

Category six is thus the only priority category that includes forfeitable benefits. It encompasses benefits accrued but not yet vested under the terms of a plan before termination. *Blessitt*, 848 F.2d at 1177. Such benefits are protected at termination by Section 411(d)(3) of the Internal Revenue Code and corresponding plan provisions like Article XIII, Section 4(h) of the Plan in this case. (J.A. 375.)

As a condition for tax qualification under Section 401(a) of the Code, Section 411(d)(3) requires plans to provide that "the rights of all affected employees to benefits accrued to the date of . . . termination . . . to the extent funded as of such date . . . are nonforfeitable." 26 U.S.C. § 411(d)(3). Section 411(d)(3) thus "vest[s] certain unvested employee benefits for workers who would otherwise be left out in the cold" on plan termination. *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3d Cir. 1987). Its purpose "is to guarantee to employees who would not otherwise have any vested right to any pension benefits at the time of a plan termination . . . that they will be treated as having a fully vested right to any benefits that have accrued and are funded." *Ashenbaugh*, 854 F.2d at 1524. The PBGC's asset allocation regulation logically

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[7] The PBGC's guarantee may not fully cover certain recent benefit increases, 29 U.S.C. § 1322(b)(1), or benefits in excess of the statutory limitation. 29 U.S.C. § 1322(b)(3).

assigns these benefits to category six, where they will in fact be paid only to the extent funded. 29 C.F.R. §§ 2618.2, 2618.16 (1987).

The PBGC has always construed Section 4044(a)(6) to include only those benefits that have accrued under the terms of a plan as of the date of plan termination. The agency's regulations under Section 4044 state that:

> The benefits assigned to priority category 6 with respect to each participant are all of the participant's benefits under the plan, whether forfeitable or nonforfeitable.

29 C.F.R. § 2618.6.[8] As early as 1975, the PBGC clarified in the preamble to the proposed version of this regulation that:

> Priority category 6 . . . contains all plan benefits with respect to a participant not assigned to priority categories 1 through 5. Thus, priority category 6 will contain the value of *accrued forfeitable* benefits of a participant.

40 Fed. Reg. 51368, 51370 (Nov. 4, 1975) (emphasis added).[9] The PBGC has consistently affirmed this view

[8] The reference in the regulation to both forfeitable and nonforfeitable benefits reflects the manner in which benefits are valued for purposes of allocation under Section 4044, and the fact that category six, although lowest in priority, has the broadest scope. *See Blessitt*, 848 F.2d at 1168. To arrive at the value of the forfeitable benefits to which assets must actually be allocated under category six, it is necessary, first, to determine all of a participant's benefits under a plan, "whether forfeitable or nonforfeitable," 29 C.F.R. § 2618.6, and, second, to deduct the amount, if any, of the participant's nonforfeitable benefits previously assigned to higher priority categories. *See* 29 U.S.C. § 1344(b)(1); 29 C.F.R. § 2618.10(c); 46 Fed. Reg. 4-5 (Jan. 28, 1981).

[9] The proposed regulation defined category six benefits as "all benefits provided by a plan, other than benefits assigned to priority categories 1 through 5." 40 Fed. Reg. at 51373. As stated in the

in numerous Opinion Letters addressing plan terminations,[10] and in the guidelines on asset reversions that the PBGC issued jointly with the other agencies responsible for administering ERISA, the Department of Labor and the Internal Revenue Service. PBGC News Release No. 84-23 (May 23, 1984), *reprinted in* 11 Pens. Rep. (BNA) 724 (May 28, 1984). *See Blessitt*, 848 F.2d at 1172.

"It is commonplace in our jurisprudence that an administrative agency's consistent, long-standing interpretation of the statute under which it operates is entitled to considerable weight." *Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979). The courts therefore "owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation . . . which [is one of] the administrative agencies responsible for enforcing

interim regulations and supplemental notice of proposed rulemaking the PBGC issued on November 3, 1976, "[n]o comments suggesting a change in the approach to th[is] priority categor[y] were received." 41 Fed. Reg. 48481 (Nov. 3, 1976). And, although the text of the PBGC's regulation changed somewhat when it was issued in final form, the preamble to the final regulation clarified that "changes in the rules for priority categories 4 through 6 . . . have been made for clarification only. There are no substantive changes from the supplemental notice." 46 Fed. Reg. 9485 (Jan. 28, 1981).

[10] *See* PBGC Opinion Letters Nos. 87-11 (Oct. 22, 1987); 86-5 (March 6, 1986); 86-1 (Jan. 15, 1986); 85-28 (Dec. 2, 1985); 85-9 (April 5, 1985). For example, the PBGC made clear in Opinion Letters 85-9 and 85-28 that residual assets in excess of the benefits accrued under a noncontributory defined benefit plan as of the termination date can revert to the employer. The PBGC reaffirmed this position in Opinion Letter 86-1, where it explained how to determine the value of lump sum distributions, like those elected and received by the respondents at Plan termination. As the Opinion Letter states, it is necessary, first, to determine the benefit to which a participant is entitled under the terms of the plan and Titles I and II of ERISA as of the date of plan termination, and, second, to "calculate the present value of the normal form of such benefit, using reasonable actuarial assumptions." Opinion Letter 86-1.

and interpreting ERISA." *Blessitt*, 848 F.2d at 1167. "[P]articularly great deference" is owed "to PBGC interpretations of Title IV of ERISA." *Id.* at 1172 n.19. *Accord Belland v. PBGC*, 726 F.2d 839, 843 (D.C. Cir. 1984); *United Steel Workers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *Concord Control, Inc. v. International Union, UAW*, 647 F.2d 701, 704 (6th Cir.), *cert. denied*, 454 U.S. 1054 (1981); *Connolly v. PBGC*, 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979). The PBGC's contemporaneous construction of Section 4044(a)(6) therefore should not be rejected without a careful examination of the statute and its legislative history. *Nachman Corp. v. PBGC*, 446 U.S. 359, 373-74 (1980).

The plain language of Section 4044(a)(6) "clearly specifies that th[is] section[] extend[s] only to benefits *under the plan*." *Blessitt*, 848 F.2d at 1169 (emphasis in original). *Accord Ashenbaugh*, 854 F.2d at 1529. Therefore, "the initial hurdle in any case of this type involves the language of the plan at the time of termination." *Wilson v. Bluefield Supply Co.*, 819 F.2d at 463. The Fourth Circuit itself has thus recognized in other cases that "[t]he scheme established by ERISA relies upon the provisions of each plan at the time of termination." *Audio Fidelity Corp. v. PBGC*, 624 F.2d at 517.

The Plan in this case used ten-year "cliff" vesting, under which the benefits an employee accrued with each year of service did not vest at all until he completed ten years of service, at which point they vested fully. (J.A. 316.) Each of the respondents had more than ten years of service and was fully vested. Vesting, however, does not "guarantee a particular amount or a method for calculating the benefit." *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 512 (1981). Rather, subject to the accrual requirements in Titles I and II of ERISA, Congress left this question largely to the parties creating the plan. *Id.* at 511.

The Plan in this case provided:

> If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to [unreduced early retirement benefits].

(J.A. 39.) Thus, under the terms of the Plan and pre-REA Titles I and II of ERISA, respondents would be entitled to the unreduced early retirement benefits they claim only if they had both completed 30 years of service and attained age 62 at plan termination. None of respondents satisfied those conditions. They therefore contended, and the court below found, that Section 4044 (a)(6) independently creates a right to unreduced early retirement benefits.

The Third Circuit properly rejected a virtually identical claim under Section 4044(a)(6) in its recent decision in *Ashenbaugh*, 854 F.2d at 1516. Like the Plan in this case, the Crucible Plan included a provision allowing participants with 30 years of service who had attained age 62 "to retire and receive the full benefits to which he or she would be entitled if he or she were to wait and retire at age 65." *Ashenbaugh*, 854 F.2d at 1519. However, like respondents, the participants in the Crucible Plan failed to meet either the age or the service requirements in the plan. *Id.* at 1520-21. They therefore relied in part on Section 4044(a)(6) to contend that termination negated those requirements. The court rejected this contention, finding that it "not only misconstrues these Plan provisions and the relevant law, but misperceives their purposes as well." 854 F.2d at 1523. As the court stated, Section 4044 "extend[s] only to benefits calculated in accordance with the terms of the retirement plan." 854 F.2d at 1529. It was thus clear that Section 4044 "does

not create a right in early retirement benefits, but only sets priorities to be applied in cases where plan funds are not sufficient." 854 F.2d at 1529.

The *Ashenbaugh* court correctly recognized that Section 4044(a)(6) does not create any substantive benefit entitlements. 854 F.2d at 1528. Those entitlements are delimited by other provisions of ERISA and the terms of defined benefit plans.[11] They are not augmented by Section 4044 at plan termination. To the contrary, termination fixes the rights of plan participants, and ends the accrual of additional vested pension rights. *E.g.*, *Blessitt*, 848 F.2d at 1172-73; *In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d at 649; *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d at 201; *Audio Fidelity Corp. v. PBGC*, 624 F.2d at 517. Thus, after termination, employees no longer have a justifiable expectation of continued benefit accrual. *Blessitt*, 848 F.2d at 1173; *PBGC v. Heppenstall*, 633 F.2d 293, 301-02 (3d Cir. 1980).

The Fourth Circuit's decision to the contrary cannot be reconciled with the concept of defined benefit plans under ERISA. Defined benefit plans are "designed and administered to provide fixed—or 'defined'—benefits to the participants based on a benefit formula set forth in the [p]lan." *Wilson v. Bluefield Supply Co.*, 819 F.2d at 459; *see Nachman Corp. v. PBGC*, 446 U.S. at 363 n.5. An employer maintaining such a plan is responsible for ensuring sufficient funding to pay the plan's defined benefit obligations when they become due. The employer therefore bears the risk of the plan's investment experience. *Wilson*, 819 F.2d at 459; *see Blessitt*, 848 F.2d at 1177.

An employer's contributions to a defined benefit plan are adjusted to whatever level is necessary to fund the

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[11] *See* the Internal Revenue Service's analysis in Gen. Couns. Mem. 39,665 (Sept. 25, 1987), which is quoted in *Blessitt*, 848 F.2d at 1175 n.25.

defined benefits. *Nachman*, 446 U.S. at 363 n.5. Contributions thus will vary according to actuarial predictions, including assumptions regarding such variables as employee compensation, employee turnover, investment returns, and mortality. For example, if the investment yield in a particular plan year is less than that actuarially assumed, the employer may be required to make additional or larger contributions in the following year. *See Wilson*, 819 F.2d at 459. On the other hand, if the investment yield exceeds the yield assumed by the actuary, the employer may be permitted to make a smaller contribution in the following plan year. *Id.* In either event, however, there is no effect on the defined benefits of the plan's participants. *Id.* In such circumstances, "[i]t is not inequitable to permit employers to receive the benefit of the upside investment risk," *Blessitt*, 848 F.2d at 1177, by recovering residual assets.

"Residual assets, by definition, are assets in *excess* of those necessary to satisfy defined benefit obligations." *Wilson*, 819 F.2d at 464 (emphasis in original). They are "those assets remaining in a pension plan at the time of termination after payment to the employees of all accrued benefits under the plan." *Id.* at 458; *see Chait v. Bernstein*, 835 F.2d at 1026. *See also* 29 C.F.R. § 2618.2 (defining "residual assets" as "the plan assets remaining after all liabilities of the plan to participants and their beneficiaries for benefits through priority category 6 have been satisfied"). And, "ERISA explicitly provide[s] for the recapture of surplus assets by the employer after a pension plan has been terminated and accrued benefits have been allocated." *District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1478 (S.D.N.Y. 1983); *see In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128, 1133 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1273, 1275 (3d Cir. 1978).

The only authority cited by the Fourth Circuit for its decision to the contrary is *Amato*. The primary issue in that case, which is not addressed in this brief, was whether a plan amendment eliminating unreduced early retirement benefits decreased "accrued benefits" in violation of Section 411(d)(6) of the Internal Revenue Code. 773 F.2d at 1407. The court decided that it did because unreduced early retirement benefits are "accrued benefits." *Id.* at 1414. Although unnecessary to its decision, the court also addressed the claim of the plan participants that the plan amendment constituted a partial termination, and that they were therefore entitled under Section 4044(a)(6) to unreduced early retirement benefits, regardless of whether they had accrued. 757 F.2d at 1414-16. It concluded that category six was not limited to "accrued benefits," but also included "benefit expectations." 773 F.2d at 1416. In reaching this conclusion, however, the *Amato* court misconstrued the PBGC's interpretation of Section 4044(a)(6). 773 F.2d at 1415. The court, moreover, relied on a conclusory and incomplete review of the legislative history of Section 4044. 773 F.2d at 1416.

The House bill (H.R. 2) and the Senate amendment thereto included substantially different versions of the provision that ultimately was enacted, after conference substitution, as Section 4044. The House bill included a complex allocation scheme, consisting of four primary priority categories: (1) employee contributions; (2) the present value of nonforfeitable benefits in pay status or for which a participant qualified on the date of plan termination; (3) the present value of other nonforfeitable benefits; and (4) the present value of "*accrued benefits*" not payable under higher priority categories. H.R. 2, 93d Cong., 2d Sess. § 112(b)(1)-(4) (1974) (as passed by the House on February 28, 1974) (emphasis added), *reprinted in* III *Subcomm. on Labor of the Senate Committee on Labor and Public Welfare*, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3898, 3957-58 (Comm. Print 1976) (hereinafter "Leg. Hist."). Any remaining assets attributable to investment earnings on employee contributions were to be distributed ratably to the contributors. *Id.* at § 112(d)(1); III Leg. Hist. at 3960. Remaining assets attributable to employer contributions were to be used to satisfy "liabilities the plan may set forth as being payable only if the plan terminates," and thereafter "be distributed as provided in the plan", or, if the plan had no provision for such distribution, on a pro rata basis to each person otherwise entitled to a distribution under the bill. *Id.* at § 112(d); III *Leg. Hist.* at 3960.

The Senate amendment to H.R. 2 provided for a much simpler allocation scheme. It required the allocation of assets only to benefits derived from mandatory and voluntary employee contributions and the other guaranteed benefits now included in categories one through four of Section 4044. H.R. 2, 93d Cong., 2d Sess. § 444 (1974) (as passed by the Senate on March 4, 1974); III *Leg. Hist.* at 3599, 3720-22. Under the Senate amendment, residual assets could be distributed "in accordance with the terms of the plan, and not in contravention of existing law, to the employer who maintains the plan after all liabilities of the plan with respect to participants and their beneficiaries have been satisfied." *Id.* at § 522(d)(2)(J), III *Leg. Hist.* at 3793.

The Conference Committee considered the House bill and the Senate amendment, and substituted the allocation scheme combining the two that was ultimately enacted. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 234-37, 375 (1974); III *Leg. Hist.* at 4504-07, 4642. The Conference substitute was based on a recommendation of the Administration, which was designed to "combine[] the best features of the House and Senate bills." III *Leg. Hist.* at 5106. Like the House and Senate bills,

the Conference substitute nowhere provided for the allocation of assets to benefits not accrued or payable under the terms of a plan as of the date of plan termination.

Relying solely on the fact that the Conference substitute did not include in category six the word "accrued" that appeared in the fourth category of the House bill, the *Amato* court concluded that "Congress . . . decided not to limit the allocation requirement to accrued benefits but to require that, as long as assets were available, they should be used to meet participants' benefits expectations based upon the Plan's full benefit structure." 773 F.2d at 1416. This conclusion is untenable. It is unsupported by the text of either the House or Senate bill, and directly contrary to Congress's intent to incorporate pre-ERISA law in this respect.

The legislative history of the termination provisions in the Conference substitute explains that:

> Under the conference substitute, as under present law, all accrued benefits in a qualified pension plan must become fully vested (*in accordance with the rules of the bill concerning allocation of assets upon plan termination* and to the extent then funded) in the event of a plan termination.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 277 (1974) (emphasis added). III *Leg. Hist.* at 4544. Pre-ERISA law required a terminated plan to provide only benefits "accrued up to the time of termination." Rev. Rul. 71-152, 1971-1 C.B. 126.[12] There is no language in Section 4044 of ERISA that alters this rule. The courts therefore have generally recognized that ERISA permits the reversion of residual assets after payment of all accrued benefits. *Wilson v. Bluefield Supply Co.*, 819 F.2d at 457;

[12] This pre-ERISA ruling was replaced by Rev. Rul. 83-52, 1983-1 C.B. 87, which restates the same principle. Rev. Rul. 83-52 was subsequently modified and superceded by Rev. Rul. 85-6, 1985-1 C.B. 133, in light of the requirements of Section 301 of REA.

Chait v. Bernstein, 835 F.2d at 1021; *see Blessitt*, 848 F.2d at 1173 & n.20.[13]

In interpreting ERISA, "courts must always bear in mind the ultimate consideration whether allowance or disallowance of the particular relief would best effectuate the underlying purposes of ERISA," including the "promotion of the best interests of participants and beneficiaries." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 158 (1985) (Brennan, J. concurring). Here, however, the Fourth Circuit ignored both the policies underlying Section 4044 and the long-term interests of participants and their beneficiaries in defined benefit plans.

Section 4044 is "clearly intended to ensure that while an employer is obligated to provide defined benefits to

[13] In *Blessitt*, the Eleventh Circuit, sitting en banc, held that category six "does not encompass *normal* retirement benefits calculated on the basis of anticipated future years of service." 848 F.2d at 1178 n.31 (emphasis added). The court attempted to distinguish *Amato* and the instant case on the grounds that those cases "dealt with early retirement or retirement-subsidy type benefits, not with an employee's normal retirement benefit." 848 F.2d at 1173 n.21. It therefore purported not to address the question whether category six is limited to accrued forfeitable benefits. 848 F.2d at 1178 n.31. However, the principles *Blessitt* enunciates under Section 4044(a)(6) nevertheless control in this case.

Blessitt makes clear, for example, that employees cannot use Section 4044(a)(6) to increase the amounts of their benefits at plan termination. *Id.* at 1169. As the court stated, an employee can "reasonably expect to receive benefits under [early retirement] provisions only to the extent he earns them through actual—not anticipated—years of service." 848 F.2d at 1174 n.22. *See also* Gen. Couns. Mem. 39,665.

Respondents did not earn the unreduced retirement benefits the court below awarded. They either had not actually completed 30 years of service, or had not attained age 62 at the time of termination. The award of early retirement benefits, to the extent that such benefits exceed the requirements of the Plan and Titles I and II of ERISA, is therefore inconsistent with Section 4044(a)(6), as construed in *Blessitt*.

plan participants, the participants should not be able to claim a windfall stemming from the employer's accidental overfunding of a defined benefit plan." *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 555 F. Supp. 257, 260 (D.D.C. 1983). In fact, "[c]ommon sense dictates that employers which fund plans under ERISA guidelines should not be penalized for overfunding in an abundance of caution or as a result of miscalculation by the actuary." *Chait v. Bernstein*, 835 F.2d at 1027, *quoting Wright v. Nimmons*, 641 F. Supp. 1391, 1407 (S.D. Tex. 1986). This is because, "[o]ver a period of time, pension plan participants in general stand to benefit more from a policy that encourages employers to fund pension plans generously than from a policy that entitles plan participants to surplus assets and thereby discourages employers from potentially excessive funding." *Eager v. Savannah Foods & Industries, Inc.*, 605 F. Supp. 415, 420 (N.D. Ala. 1985).

Allowing reversions in accordance with valid plan provisions after payment of all defined benefits accrued under the terms of a plan thus is consistent with the policies underlying ERISA. To decide otherwise would be to jeopardize the orderly administration of plan terminations, and unsettle the past distribution of billions of dollars in terminated plan assets.

The PBGC maintains statistics on terminations that resulted in reversions of $1 million or more in calendar years 1980 through 1987. During those years, 1,635 plans terminated with assets that exceeded, by at least $1 million, the present value of benefits accrued through the date of plan termination. Almost $22 billion has been distributed to the 1.8 million employees and retirees who participated in those plans, and more than $18 billion in residual assets has reverted to their employers. As of December 31, 1987, the distribution of an additional $695 million in plan assets was in question in 54

then-pending termination cases involving potential reversions of $1 million or more. Reversions of lesser amounts obviously have resulted from the terminations of numerous other plans. The PBGC estimates, for example, that at least 4,800 of the more than 6,800 plans terminated in 1986 had assets that exceeded the present value of the benefits accrued under the plans at the time of termination.

The decision of the Fourth Circuit has created substantial uncertainty about the distribution of assets in pending cases, and, if allowed to stand, may be relied upon to require the reallocation of billions of dollars already distributed to employers and their employees pursuant to Section 4044. Plan participants in several cases pending in circuits not bound by the decisions in *Blessitt* and *Ashenbaugh* have asserted Section 4044 as a basis for obtaining benefits greater than those accrued or payable under the terms of their plans as of the date of plan termination.[14] The resulting administrative and judicial task of reallocating assets to provide these additional benefit amounts will be difficult if not impossible.

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[14] *Larry D. Freeman, et al. v. CRS Sirrine, Inc. Retirement Plan and Trust*, No. 6:87-3319-3 (D.S.C. filed Dec. 16, 1987) (class action complaint alleging entitlement to "the present value of benefits promised under the plan, but not yet accrued"); *Fechter, et al. v. HMW Industries, Inc.*, No. 87-0506 (E.D. Pa. amended class action complaint filed Jan. 1988) (asserting claim for "benefits promised under the Plan but not accrued as of the date of termination"). Additional cases raising similar claims are cited in the Petition at p. 17 n.9.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

No. 87-1868 (21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE MEAD CORPORATION,
Petitioners,

v.

B. E. TILLEY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Association of Retired Persons is a not-for-profit corporation of more than thirty million persons age fifty and older.[1] AARP is the largest organization of its kind in America. In representing the inter-

[1] The American Association of Retired Persons files this brief *amicus curiae* with the written consents of the parties, which have been filed with the Clerk of the Court.

ests of its members, AARP seeks to promote the independence, dignity, and well-being of older Americans. More than eight million AARP members are actively employed, many of whom are participating in pension plans subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* "ERISA". These plans play a pivotal role in promoting the retirement security of plan participants, and their terms materially affect the employment and retirement decisions of millions of workers on a day-to-day basis. The ability of AARP members and other older persons to rely on the terms of the plans in which they participate is essential to well-informed employment and retirement planning.

The issue in this case concerns an employer's obligation to pay subsidized early retirement benefits to older employees upon voluntary termination of a healthy pension plan. AARP has a substantial interest in the resolution of this issue, since millions of older Americans participate in defined benefit pension plans with early retirement provisions similar, if not identical, to the plan provision here.[2]

SUMMARY OF ARGUMENT

The result reached by the court below, that the plaintiffs are entitled upon termination to the earned portion of their early retirement benefits, should be affirmed. That result (1) is consistent with the pre-ERISA versions of the Internal Revenue Code (and its implementing regulations), the operative portions of which were adopted *verbatim* in ERISA, (2) is supported by the legislative history of ERISA, (3) is consistent with time-honored principles of unilateral contracts, and (4) furthers the development of federal common law under ERISA that protects the legitimate benefit expectations of millions of working Americans.

[2] Indeed, the early retirement provisions which form the cornerstone of this litigation are the rule rather than the exception in the pension plans of large corporate employers nationwide. Of the pension plans of the nation's fifty largest industrial companies, *forty-seven* (94%) provide for unreduced early retirement benefits by age 62 to employees with the requisite service. *See* a Survey of Retirement, Thrift, and Profit-Sharing Plans Covering Salaried Employees of 50 Large U.S. Industrial Companies as of January 1, 1988 (Wyatt Company) at 8. Likewise, twenty-five (50%) provide for unreduced benefits at age 60, while ten (20%) provide for unreduced benefits at age 55. *Id.*

Long before the passage of ERISA, section 401(a)(2) of the Internal Revenue Code required employers terminating healthy pension plans to pay all fixed and contingent liabilities prior to recovering plan assets resulting from actuarial error. Contemporaneous regulations of the Internal Revenue Service implementing this provision required employers to satisfy precisely the type of contingent liability at issue here.

In passing ERISA, Congress left § 401(a)(2) intact and specifically incorporated its language on liability *verbatim* into section 4044(d)(1) of ERISA's termination provisions. Contrary to the argument advanced by the company and its *amici*, Congress clearly rejected any attempts to equate the term "liability" with "accrued" benefits.

Finally, there is simply no support in ERISA for the company's novel proposition that the courts are foreclosed from equitably enforcing the payment of benefits that are not specifically required by ERISA. The company's disregard of well-established principles of unilateral contracts directly conflicts with congressional intent that the courts fashion a uniform body of federal common law under ERISA. Indeed, the company's theory of the case would render nugatory all plan provisions regarding subsidized early retirement benefits upon plan termination.

ARGUMENT

I. EARLY RETIREMENT SUBSIDIES ARE LIABILITIES THAT MUST BE SATISFIED UNDER ERISA AND THE INTERNAL REVENUE CODE IN ORDER FOR AN EMPLOYER TO RECOVER SURPLUS ASSETS.

Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), permits a sponsor of a pension plan to recover plan assets after "*all liabilities* of the plan to participants and their beneficiaries have been satisfied." (emphasis added.) The principal issue in this case is whether an early retirement subsidy is a "liability" of a plan.

Mead and its *amici* frame the issue differently. They argue that the critical issue is whether substantive rights to early retirement subsidies are created by § 4044(a), a section whose purpose is to prioritize the allocation of plan assets on termination.[3] Mead answers in the negative, but then concludes illogically that only benefits "accrued" under the technical definition of Internal Revenue Code § 411(a)(7) are payable upon plan termination.

Mead's argument that § 4044(a)(6) (hereafter "Category 6") does not create substantive rights, however, sheds no light on the meaning of the word "liabilities" in § 4044(d)(1).[4] The term "liabilities" has a broader meaning than "accrued benefits" and includes both contingent liabilities that had to be satisfied under pre-ERISA law and liabilities cognizable under the federal common law of ERISA.

A. Prior To ERISA, The Internal Revenue Code Required The Satisfaction Of All Plan Liabilities Prior To The Recapture Of Excess Assets.

Prior to 1938, the federal tax laws had permitted employers to deduct contributions to revocable pension trusts and terminate them at will at some later date. Federal law did not require the trust to satisfy any liabilities and state law generally accorded employees few rights to enforce pension promises.[5]

The House of Representatives was concerned with these revocable pension trusts and proposed legislation that would have made it impossible for plan assets to revert to the employer either before or after plan termination. H.R. 9682, 75th Cong., 3d Sess. 175 (1938).[6] The Senate modified the House proposal to make diver-

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[3] Section 4044(a), 29 U.S.C. § 1344(a), establishes allocation priorities for assets on plan termination. The final category under § 4044(a) requires a plan to pay "all other benefits under the plan" to the extent assets are available. *See* 29 U.S.C. § 1344(a)(6).

[4] The definition of "accrued benefit" was designed to prevent employers from circumventing ERISA's minimum vesting standards. Mead's interpretation of "accrued benefit" would cause substantial damage to the purpose and structure of ERISA by suggesting that the term has an invidious purpose never contemplated by Congress: to prevent employers from making binding promises, and plans from having genuine liabilities, unless those promises and liabilities conform to the rigid definition of "accrued benefit." *See, e.g.*, S. Rep. No. 383, 93d Cong., 1st Sess. 51: (I Leg. Hist. 1119)

[5] At the time, state laws generally considered pension benefits as gratuities with no concomitant legal obligations imposed on the plan or its sponsoring employer. *See* D. McGill, FULFILLING PENSION EXPECTATIONS 161 (1962) ("in the beginning all private pension benefits were regarded as gratuities from a grateful employer"); M. Latimer, INDUSTRIAL PENSION SYSTEMS, 681-82 (1932).

[6] The House adopted a proposal of a subcommittee of the House Ways and Means Committee. The subcommittee had proposed requiring the irrevocability of a pension trust as a condition for status as a qualified plan. The Subcommittee noted that "it was evident that the employer should not be allowed a deduction for amounts which are still within his control and subject to recapture through a power to revoke the trust." House Committee on Ways and Means, Proposed Revisions of the Revenue Laws, 75th Cong., 3d Sess. at 56, 85 (1938), *reprinted in* 21 U.S. Revenue Acts (B. Reams, ed. 1979).

sion impossible "at any time prior to the satisfaction of *all liabilities* with respect to employees under the trust," S. Rep. 1567, 75th Cong., 3d Sess. 24 (1938) (emphasis added), because:

> . . . it is quite possible that *after satisfaction of all pension liability under the trust*, an additional amount of funds of the trust will remain, due to erroneous actuarial computations during the previous life of the trust. It seems desirable to allow the employer to provide for the return of such an amount in the trust without the trust losing its exempt status.

Id. The bill, as amended by the Senate, was passed and signed into law, becoming § 165(a)(2) of the Internal Revenue Code of 1939. This critical sequence of legislative events leads inescapably to the conclusion that § 165(a)(2), since recodified as § 401(a)(2),[7] requires a terminating plan to satisfy all liabilities prior to the reversion of assets to an employer.[8]

B. Contemporaneous Regulations Issued By The Department Of Treasury Specify That The Type Of Contingent Liability Owed To The Plaintiffs Has To Be Satisfied At Plan Termination.

For almost fifty years, regulations issued by the Department of Treasury have unambiguously interpreted § 401(a)(2) to require terminating pension plans to satisfy precisely the type of "liabilities" that give rise to the plaintiffs' claims here. The regulation provides:

> (2) The term "liabilities" as used in § 401(a)(2) includes both fixed and contingent obligations to employees. For example, if 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, *contingent obligations to such 700 employees have nevertheless arisen which constitute "liabilities" within the meaning of that term.*

Treas. Reg. § 1.401-(2)(b)(2) (emphasis added).[9] These regulations, issued contemporaneously with the passage of § 401(a)(2) and substantively unchanged for over fifty years, are entitled to a strong presumption in favor of their validity. *Bob Jones University v. United States*, 461 U.S. 574, 596 (1983). The regulations, on their face, unequivocally require plans to pay contingent benefits prior to a reversion of excess assets.[10]

Mead, however, counters the clarity of the regulations with an assertion concerning a 1953 revenue ruling that completely ignores the ruling's historical context. The ruling relied upon by Mead states that "[c]ontingent liabilities are the benefit credits accrued up to the time

[7] During the extensive revision of the Internal Revenue Code in 1954, § 165(a)(2) was renumbered as § 401(a)(2). I.R.C. § 401(a)(2) (1954).

[8] Congress intended § 165(a)(2) to place severe limitations on reversions; it was a defeat for those who argued then, as Mead does now, that restrictions on an employer's right to utilize pension funds for non-pension purposes is unfair to employers and would result in the demise of defined benefit plans. *See generally*, Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 Am. J. Tax Pol'y 119, 144-45 (noting testimony of Ellsworth Alvord on behalf of U.S. Chamber of Commerce).

[9] In addition, the regulation further provides that the *source* of the liability is far less important than the requirement that it be satisfied upon plan termination. The regulation requires satisfaction upon termination "*regardless of whether such obligations are, technically speaking, liabilities of the employer, of the trust, or of some other person forming a part of the plan or connected with it.*" Treas. Reg. § 1.401-2(b)(2) (emphasis added).

[10] Plaintiffs' claims for benefits are arguably stronger than the theoretical example provided in the regulations. In contrast to the example in which the service requirements of the plan had not been satisfied, five of the six plaintiffs in this case had already satisfied the plan's service requirement (30 years) for subsidized early retirement benefits at the time of termination.

of termination of the trust for employees. . . who might have become entitled to benefits if the trust had been continued indefinitely." Rev. Rul. 53-33, 1953-1 C.B. 267. Brief of Petitioner at 42. Mead contends that this sentence limited the rights of participants in a terminating plan to whatever non-vested benefits had been formally credited to them under the plan. *Id.*

Mead ignores the fact that before ERISA few, if any, plans provided for "accrued benefits," in the ERISA sense, prior to the time of vesting. In fact, the overwhelming majority of plans in 1938 delayed vesting or accrual until an employee had met applicable age and service requirements,[11] precisely the situation with respect to the early retirement benefits in this case. In Mead's view, § 401(a)(2) would have required few if any terminating plans to satisfy any liabilities except to employees who had already retired.

This is simply wrong. The legislative history of § 401(a)(2) makes absolutely plain that Congress believed it was significantly altering the law to protect both employee benefits and tax revenues when a plan terminated. Congress wanted plans to pay their liabilities and the regulations reflected this by providing that liabilities had to be paid even though not all eligibility conditions had been satisfied at the time of termination.

For these reasons, the phrase "benefits accrued to date" used by the IRS in its 1953 revenue ruling must be placed in context and not read to overrule the very regulation

[11] *See generally* M. Latimer, INDUSTRIAL PENSION SYSTEMS, 707-746 (1932) (study indicated that under most plans employees earned no benefits until satisfying both age and service requirements); *see also e.g., Schofield v. Zion's Co-Op Mercantile Institution*, 39 P.2d 342 (Utah 1934) (employee earns no benefit under the plan until attaining age 65 with 20 years of service); *Texas & New Orleans Ry. Co. v. Jones*, 103 S.W. 2d 1043 (Tex. Ct. Civ. App. 1937) (age 60, 20 years); *Brush-Moore Newspapers, Inc. v. Comm'r*, 15 T.C. Mem. (P.H.) ¶ 46,280 (1946) (page 65).

it interprets. The only reading of the revenue ruling that is consistent with the regulation and the statute is that on plan termination an employee is entitled to a pro rata portion of the total benefit he would have earned had the plan continued indefinitely.[12]

C. Through ERISA, Congress Specifically Preserved The Rights Of Employees To Receive Contingent Obligations Upon Plan Termination.

In passing ERISA, Congress specifically preserved the requirements of § 401(a)(2) of the Code and its implementing regulations requiring the payment of all plan "liabilities" prior to a reversion of assets.

The House bill (H.R. 2) set forth four priority categories for the allocation of benefits for terminating pension plans. H.R. 2, *as passed by the House*, 93d Cong., 2d Sess. § 112(b)(1)-(4) (1974); III Leg. History at 3898, 3957-58.[13] The Senate amendment to H.R. 2 pro-

[12] A variation of this approach is, in fact, one of the three permissible accrual rules adopted by Congress in ERISA. *See* I.R.C. § 411(b)(1)(C) (describing the fractional method of accrual); *see also* ERISA § 204(b)(1)(C), 29 U.S.C. § 1054(b)(1)(C). Here it is noteworthy that Mead incorrectly assumes that the term "accrued" had the same meaning both before and after it was defined in ERISA. This is incorrect. Prior to ERISA, the word "accrued benefit" had no generally accepted meaning. As Congress noted, the term was in need of definition in order to prevent "end runs" around the vesting rules. S. Rep. 383, 93rd Cong., 1st Sess. 51 *reprinted in* I Legislative History of the Employee Retirement Income Security Act of 1974, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong. 2d Sess. (1976) at 1119 (hereinafter "Leg. Hist."); H.R. Rep. 807, 93d Cong., 2d Sess. 670; II Leg. Hist. 3180.

[13] The four categories included in the House bill were (1) employee contributions, (2) the present value of nonforfeitable benefits in pay status or for which a participant qualified on the date of plan termination, (3) the present value of other nonforfeitable benefits, and (4) the present value of accrued benefits not payable under higher priority categories.

vided for the allocation of assets only to benefits attributable to mandatory and voluntary employee contribuitons and other benefits guaranteed by the PBGC. H.R. 2, *as passed by the Senate*, 93d Cong., 2d Sess. § 444 (1974); III Leg. Hist. at 3599, 3720-22. Significantly, the fiduciary provisions of the Senate amendment prohibited any reversion of surplus assets until *"all liabilities* of the plan with respect to participants and their beneficiaries have been satisfied." *Id.* at § 522 (d)(2)(J); III Leg. Hist. at 3793 (emphasis added).

The Conference Committee substituted the allocation scheme that was ultimately enacted as part of § 4044(a). H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 234-37 (1974); III Leg. Hist. at 4504-07. In so doing, the Conference Committee finalized two key provisions, both of which preserve the integrity of pre-ERISA law requiring the payment of contingent obligations upon plan termination.

First, the Conference adopted substantially *verbatim* the Senate amendment regarding the payment of plan liabilities.[14] As a result, § 4044(d)(1) provides that residual assets may not revert until after "all liabilities of the plan to participants and their beneficiaries have been satisfied." 29 U.S.C. § 1344(d)(1). Thus, § 4044(d)(1) continued in effect the pre-ERISA requirement of the Code that terminating plans satisfy *all liabilities*, including those represented by the type of contingent obligations owed to the employees in this case. *See* Treas. Reg. § 1.401-2(b)(2).

[14] The House bill restricted the term "liabilities" to the benefits allocated under the bill which would not have included early retirement subsidies unless they were accrued benefits. H.R. 2, *as passed by the House*, § 112(d)(3); III Leg. Hist. 3960-61. The Conference Committee, however, broadened the category of benefits that were liabilities of the plan to include "all other benefits," which, as PBGC regulations provide, includes both forfeitable and nonforfeitable benefits. 29 C.F.R. § 2618.6. *See* Brief of Pension Benefit Guaranty Corporation (PBGC) at 12.

Second, the Conference Committee generously expanded the allocation provisions set forth in the House bill to *include* Category 6 benefits identified as "all other benefits under the plan." 29 U.S.C. § 1344(a)(6). This amendment was a practical necessity to ensure that the incorporation of the pre-ERISA obligation to pay "all liabilities" in § 4044(d)(1) was not unduly restricted by the allocation rules set forth in the House bill.[15]

Nevertheless, both the company and its *amici* urge that the Court ignore Congressional use of the terms "liability" in § 4044(d)(1) and "benefits" in Category 6 because the "legislative history contains no express statement that Congress intended through deletion of the word 'accrued,'" to require satisfaction of the type of obligations owed to the plaintiffs here.[16] That argument is unavailing, however, since the Court's analysis must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language acurately expresses the legislative purpose." ***Metropolitan Life Insurance Co. v. Massachusetts***, 471 U.S. 724, 740 (1985).[17] Mead's attempt to restrict the language "all other benefits under the plan" of Category 6 to "accrued benefits" would render meaningless the term "liabilities"

[15] It is important to note also that the term "liabilities" in § 4044(d) and the term "all other benefits" in § 4044(a)(6) also includes all employee benefit claims enforceable under the federal common law of ERISA, discussed in Section I.D., *infra*.

[16] *See* Brief of Petitioner at 20; PBGC Br. at 20.

[17] *See also Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1560-61 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984) ("The best guide to what a statute [ERISA] *means* is what it *says*").

in § 4044(d)(1) and would nullify more than fifty years of Treasury Regulations interpreting that provision.[18]

Likewise, the PBGC's argument that Category 6 is limited to accrued benefits that vest at plan termination is at odds with congressional intent. Section 4044(a)(5) provides that benefits shall be allocated "to all other non-forfeitable benefits under the plan." 29 U.S.C. § 1344 (a)(5). In the Senate Finance Committee bill, virtually identical language included accrued benefits that vested at plan termination. S. 1179, 93 Cong., 1st Sess., § 422 (a)(1); I Leg. Hist. 908. In addition, when Congress used the same language in § 4022(a) of ERISA, 29 U.S.C. § 1322(a), it specifically excluded accrued benefits that vest at termination, with the resulting implication that they are otherwise included. For these reasons, the PBGC is wrong in arguing that § 4044(a)(6) is limited to accrued benefits that vest at termination.[19]

D. The Payment Of The Liabilities To The Employees Is Consistent With Common Law Principles Of Contracts.

Despite the undisputed fact that five of the plaintiffs had, at the time of plan termination, worked the entire thirty years of service required to qualify for the early retirement subsidy at age 62, Mead claims that the pay-

[18] For those same reasons, the post-ERISA Revenue Rulings cited by the company are unpersuasive indicia of congressional intent. Revenue Rulings are not entitled to the status of Treasury Regulations. *See Brook, Inc. v. Commissioner of Internal Revenue*, 799 F.2d 833 (2d Cir. 1986).

[19] In addition, the PBGC argues that inclusion of subsidized early retirement benefits will dilute the rights of other Category 6 claimants. If this concern is genuine, the PBGC can exercise the authority granted by § 4044(b)(6) "to establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a). . . ." 29 U.S.C. § 1344(b)(6).

ment of the benefits promised to plaintiffs would be "heretical." Brief of Petitioner at 41.[20] Mead argues that after it has received the benefit of the bargain it made with the plaintiffs, it can lawfully render total performance by the plaintiffs an impossibility by unilaterally terminating the plan prior to the time the plaintiffs reach age 62. The result is untenable.[21]

In practical effect, the company argues that the only pension rights enforceable in the federal courts are those explicitly conferred by the statute.[22] This restrictive reading of the Court's authority under ERISA is plainly contrary to congressional intent since it frustrates the objective of providing retirement security to plan partici-

[20] Mead consistently uses the term "benefit expectations" in an attempt to connect this case to *Blessit v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *vacated, reh'g granted*, 836 F.2d 1571, *op. on reh'g*, 848 F.2d 1164 (1988) (en banc). Despite Mead's attempt to cast the plaintiffs' claims here and those of the employees in *Blessit* as two peas in a pod, that case is inapposite to the current controversy since the claims of the employees advanced in *Blessit* were "based on future service not actually worked," 848 F.2d at 1176, while here the claims are based on service actually rendered.

[21] In fact, it is precisely this type of result which prompted Congress to pass ERISA in the first instance. Hypertechnical requirements set forth in pre-ERISA pension plans often resulted in complete forfeiture of employee pensions when the individual did not attain the specified age while still employed, regardless of service. *See generally*, Note, *Legal Problems of Private Pension Plans*, 70 Harv. L. R. 490, 491 (1957).

[22] Even the PBGC disagrees with this view by recognizing that "the allocation process is separate from any judicial remedies based on equity or violations of the fiduciary standards of the Act. Moreover, PBGC believes that 'provision of law' includes judicial interpretation of written laws and does not preclude a court from exercising its equitable powers." 46 Fed. Reg. 49843 (Oct. 8, 1981). Thus, § 4044(a) does not restrict the Court's ability to fashion equitable remedies for benefits owed.

pants.[23] More specifically, it is at odds with the underlying premise of ERISA that pension benefits are deferred wages.[24]

Mead twists the theory that pension benefits are deferred wages by arguing that the employer can unilaterally determine if the "wages" are ever paid. It was no doubt to prevent exactly this sort of abuse that Congress empowered the courts to develop a body of federal common law to deal with employee benefit claims. As Senator Javits remarked, "It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (Senate, Aug. 22, 1974); III Leg. Hist. 4771; *see Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 107 S. Ct. 1549, 1557-58 (1987).

Since pension plans are offers to employees of benefits if they comply with the terms of the offer, it is appropriate in developing federal common law to draw from the body of law that enforces promises, the law of contracts.[25] When, as here, the promisor is the cause of the failure of performance (i.e. the termination of the plan prior to the employees attainment of the requisite age),

[23] Congress found that the "continued well-being and security of millions of employees were directly affected by [employee benefit] plans; that they are affected by a national public interest, and that it was desirable, in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans." ERISA § 2(a), 29 U.S.C. § 1001(a). Congress declared it to be the policy of the Act to provide for appropriate remedies for violations of the rights and obligations created by the Act. ERISA § 2(c), 29 U.S.C. § 1001(c).

[24] "The Act presumes the promised pension benefits are in the form of a conditional deferred wage." H.R. Rep. 533, 93d Cong., 1st Sess. at 13; II Leg. Hist. 2360.

[25] *Cf. Scott v. Gulf Oil Corporation*, 754 F.2d 1499, 1501-02 (9th Cir. 1985).

the promisor cannot take advantage of its act. Williston, II THE LAW OF CONTRACTS § 677 (3d ed. 1961). The most fundamental notions of justice and fair play require that the result reached by the Fourth Circuit be upheld, particularly since Mead's frustration of plaintiffs' performance resulted in Mead's own substantial enrichment.

II. AN EARLY RETIREMENT SUBSIDY IS AN ACCRUED BENEFIT FOR PURPOSES OF ERISA'S ANTI-CUTBACK RULE.

ERISA's so-called anti-cutback rule prohibits an employer from reducing (or eliminating) an accrued benefit by amending or terminating the plan. ERISA § 204(g), 29 U.S.C. § 1054(g). In turn, ERISA defines the term "accrued benefit" as an employee's "benefit under the terms of the plan . . . expressed in the *form* of an annual benefit commencing at normal retirement age." I.R.C. § 411(a)(7); *see also* ERISA § 3(23), 29 U.S.C. § 1002(23). Early retirement benefits are accrued benefits, and Mead's elimination of them violated the anti-cutback rule.

In regulations, (Treas. Reg. § 1.411(d)-3(b)), Revenue Rulings, (81-12, 1981-1 C.B. 228), and litigation, (*Amato v. Western Union International, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986),[26] the IRS has consistently interpreted the term accrued benefit to extend to the type of early retirement benefits at issue in this case. The Second Circuit, in *Amato*, agreed with the IRS, holding that under the statute an accrued benefit is not limited to an annual benefit commencing at normal retirement age but to a benefit expressed *in the form* of an annual benefit commencing at normal retirement age. An early retirement benefit that accelerates the annual retirement benefit (with less than full actuarial reduction) is in the *form* of such annual benefit (and may not be eliminated

[26] The IRS participated as *amicus curiae* in *Amato*.

or reduced). *Amato v. Western Union International, Inc.*, 773 F.2d at 1408.

The interpretation of the IRS adopted by the Second Circuit in *Amato* is entitled to substantial deference by the Courts. The Internal Revenue Service has "the primary authority . . . in construing the Internal Revenue Code." *Bob Jones University v. United States*, 461 U.S. 574, 596 (1983). When more than one plausible construction of the Code exists, it is the IRS construction that should prevail. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1983). This is especially the case here, where the IRS construction advances the broad remedial goal of ERISA to ensure that "working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives." S. Rep. 93-127 at 1; I Leg. Hist. 587.

The IRS definition of the term "accrued benefit" is also consistent with sound tax policy. ERISA generally requires advance funding of early retirement benefits through tax-favored contributions to a pension plan. The purpose of advance funding is to ensure that plans have assets to pay promised benefits "and insure the full advantage of any contribution which entitles the employer to a tax benefit." *Don E. Williams Co. v. Commissioner of Internal Revenue*, 429 U.S. 569, 579 (1976); *Brush-Moore Newspapers, Inc. v. Commissioner of Internal Revenue*, 15 T.C. Mem. (P.H.) ¶ 46, 280 (1946). Mead's position, however, is that the employer may take advantage of the generous tax treatment of pension contributions *before* the employer is obligated to pay the benefits it is funding. To permit a deduction in these circumstances is at odds with a basic principle of our income tax: that taxpayers may not deduct expenses before the expense has been incurred.

The IRS position is also supported by the legislative history of the Retirement Equity Act of 1984. Pub. L. 98-397, 98 Stat. 1426 (hereinafter "REA"). In that leg-

islation, Congress amended ERISA to provide specifically that early retirement subsidies are accrued benefits for the purposes of ERISA's anti-cutback rules. REA § 301, 26 U.S.C. § 411(d)(6)(B); 29 U.S.C. § 1054(g)(2). The legislative history of REA however, strongly suggests that the new provisions on early retirement benefits were generally regarded as a codification of present law. *See Amato v. Western Union International, Inc.*, 773 F.2d at 1411.

Mead argues that its interpretation of the statutory definition of accrued benefit is the better one because of a brief passage in the House Report on ERISA. This passage, however, is somewhat cryptic, indicating that accrued benefits do not include early retirement subsidies for purposes of vesting, but nowhere mentioning the anti-cutback rule. *See Amato*, 773 F.2d at 1409-10.[27]

Mead finally argues that the issue of whether its cutback of the early retirement benefits was unlawful is simply not germane to this case because its elimination of the benefit, even if unlawful, did not harm the plaintiffs. Mead, however, is mistaken.

Mead's argument begins by outlining the rules that apply after the Retirement Equity Act to the elimination of an accrued, but still forfeitable, early retirement benefit when a plan terminates. Under these rules, the

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[27] In this regard, it should be noted that if Congress had subjected early retirement benefits to ERISA's vesting rules, benefits such as the type at issue here (which delay vesting beyond ten years) would have been absolutely prohibited. *See* I.R.C. § 411(a)(2)(A). Thus, it is perfectly reasonable to assume that the references in the legislative history to the effect that early retirement benefits are not accrued benefits was intended only to preserve the employer's ability to condition an early retirement benefit on more substantial tenure than would be tolerated under the vesting rules. The Internal Revenue Service's position that early retirement benefits are nevertheless subject to the anti-cutback rule is not at all inconsistent with preserving such benefits.

terminating plan must pay early retirement benefits for employees who satisfy the age and service conditions subsequent to the termination. Rev. Rul. 85-6, 1985-1 C.B. 133. Mead's brief assumes that plaintiffs could not satisfy the age and service requirements (post-termination) because Mead had sold plaintiffs' employer, the Lynchburg Foundry Company. In other words, Mead argues that post-termination service should not count unless it is for Mead itself or a Mead subsidiary.

Mead's view of the law, for which it offers not a shred of authority, is erroneous. The Internal Revenue Service has consistently taken the position under ERISA that there is no separation from service "when the employee continues to work in the same capacity for a different employer as the result of a corporate transaction." Sheppard, *Can You be Separated from Service If You Sit at the Same Desk*, 38 Tax Notes, 651 (Feb. 18, 1988).[28] Although the IRS is currently in the process of reexamining application of the "same-desk" rule to certain situations, *id.*, it still is the rule, and more important, it was the rule in 1984 when Congress indicated that the Retirement Equity Act's protection of early retirement benefits was merely a codification of then existing law. Finally, the "same-desk" rule supports the policy goals of protecting pension promises made to employees by insulating employee expectations from corporate reorganizations that do not affect the employee's actual employment situation.

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[28] Although not in the record before the Court, Counsel understands that several, if not all, of the plaintiffs remained at their jobs following the sale of the foundry.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit should be affirmed.

Dated: December 23, 1988

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(28)

No. 87-1868

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women. The affiliates of AFL-CIO and their members have a particular and direct interest in the sound interpretation and application of the Employee Retirement Income Security Act and the related tax laws to union rep-

resented workers who are participants in defined benefit pension plans.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below held that Mead Industrial Products, in terminating the Company's Salaried Retirement Plan (hereinafter "the plan") improperly distributed assets to Mead before the plan had discharged its obligation to provide to the respondent employees the subsidized, early retirement benefits promised in Article IV, § 2(b) of the plan. (J.A. 38-39). That provision states: "If a Participant with thirty (30) or more years of Credited Service elects to retire on or after he attains sixty-two (62) years of age, he shall be entitled to the Retirement Income provided under Section 1 of Article V [the Normal Retirement Benefit] without any reduction of benefits." (J.A. 39.) (That benefit is referred to hereinafter as the "early retirement benefit" or the "ERB").[1]

Five of the respondents (Messrs. Wall, Reed, Weddle, and Goode) had earned such benefits prior to the date of the plan's termination, August 1, 1983, because each had completed thirty years' of service by that date, but none had yet attained age 62. (*See* J.A. 5). A sixth respondent (Mr. Crotts) had completed twenty-eight of the thirty years' service required to receive a subsidized early retirement benefit. The plan's assets were sufficient on termination to pay these early retirement benefits and to leave a substantial sum to be recaptured by Mead.

[1] The lump sum required to provide this monthly benefit beginning at age 62 is greater than the lump sum required to provide that same monthly benefit beginning at age 65, the plan's "normal" retirement age. Pension specialists characterize early retirement benefits like the instant benefit as "subsidized" because the increased cost is paid by the Mead plan rather than by the participant through a reduction in the monthly pension amount below the amount payable at normal retirement age. *Compare* Art. V, § 2(a) of the Mead plan, J.A. 39.

The court below ordered Mead to pay the six respondents an early retirement, rather than a normal, benefit. The amounts to be distributed, the court ruled, should be calculated using the actual service respondents had performed, and should be reduced to reflect the fact that respondents would receive the benefits in advance of the dates when, had the plan and their employment continued, the plan would have paid those benefits.

The issue for this Court is whether, in light of the applicable provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the relevant provisions of the Internal Revenue Code, the court below was correct in rejecting Mead's contention that the early retirement benefit is not an "accured" benefit, as that term is defined in ERISA, and that the plan's only obligation is, therefore, to calculate respondents' benefits on the assumption that each would retire on full pensions at age 65, and not at age 62.

We agree with respondents and with the *amicus curiae* American Association of Retired Persons that the early retirement benefits were accruing throughout respondents' working lives and should have been paid, or provided to them in the form of an annuity, to the extent earned. We also agree with the court below, respondents, the Internal Revenue Service,[2] and the Second Circuit[3] that subsidized early retirement benefits, in appropriate circumstances, are to be treated as "accrued" benefits. A subsidized early retirement benefit may appropriately be characterized as "accrued" where, as here, both the amount to be paid and a participant's likelihood of becoming entitled to the benefit becomes greater as he/she provides years of service to the employer. Conceptually,

[2] *See Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1412-1412 (2d Cir. 1985), *cert. dismissed by stipulation*, 474 U.S. 1113 (1985).

[3] *Id.*

indeed, the normal and the subsidized early retirement benefit in this plan seem indistinguishable. Both provide for a benefit amount that increases with years of service and that is payable at a stated age. But we recognize that the classification of benefits as "accrued" or "unaccrued", is an art, not a science, and that ERISA is less clear than one might hope in its use of those terms.[4] And we submit that the decision below can, and should, be affirmed on a basis that does not require the Court to plumb those complexities.

In this case, the plan's assets are sufficient to pay *both* the normal retirement benefits and the additional, early retirement "subsidy" that increases the value of the earned benefit for those under 65. Moreover, as developed below, on termination, such a fully-funded plan has a contingent liability to pay an early retirement benefit when and if respondents reached age 62, and, in the case of the sixth respondent, when and if he completed the necessary service regardless of whether the benefit is determined to be accrued or unaccrued.

Accordingly, we show below that the "liabilities" that ERISA § 4041(d)(1)(A) mandates be "satisfied" on a termination are the same "liabilities" that I.R.C. § 401(a)(2) requires be "satisfied" before any assets may revert to the employer. Since 1943, as we also show, the Internal Revenue Service has interpreted that term to refer to "contingent" liabilities. And, in conformity with our contention here, the Service has ruled that subsidized

[4] *See* ERISA § 2(23), 29 U.S.C. § 1002(23) (defining the term "accrued benefit" in the case of a defined benefit plan, as "the individual's accrued benefit *determined under the plan* . . . [but] *expressed* in the *form* of an annual benefit commencing at normal retirement age)"; *Amato v. Western Union International, Inc., supra*, 773 F.2d at 1401-1402. *Cf.* I.R.C. § 411(a)(9), (defining "Normal Retirement Benefit" for vesting and accrual purposes as ". . . th greater of the early retirement benefit under the plan or the benefit under the plan commencing at normal retirement age . . ."); Boren, *Qualified Deferred Compensation Plans* § 8.06 (1983). *See* Pet. Br., p. 31, n.26 (agreeing on this point).

early retirement benefits of the kind at issue in this case are such contingent liabilities.

Second, we show that "subsidized" early retirement benefits, like the ones at issue here, must be funded, that is, paid for during the life of the plan. Accordingly, it makes good sense in construing ERISA and, in practical terms, to read the statute to require that when the plan terminates with sufficient assets to pay the subsidized benefits, the plan is liable for the benefit subject to the contingencies having to do with the participants completing the requisite service and reaching early retirement age (or pay a reduced lump sum if the plan elects to cash out the benefits upon termination). The funding, after all, is mandated to enable the play to pay its benefit promises.

Third, we demonstrate that petitioner's view of the statute is at odds with the purposes Congress cited in enacting ERISA, and that the policies petitioner invokes to support its position are at war with those purposes.

Finally, we show that in a recent amendment to ERISA, § 4041(b)(1)(D), 29 U.S.C. § 1341(b)(1)(D), Congress demonstrated its understanding that § 4044(d)(1)(A) of the Act requires that both "fixed" and "contingent" liabilities, whether or not "accrued", be paid to participants and beneficiaries. In addition to making plain that for the future, benefit liabilities like those at issue here will have to be "satisfied" on termination, the new legislation refutes petitioner's and PBGC's contention that subsidized early retirement benefits need not be paid on termination to participants situated as respondents are.

I. The Subsidized Early Retirement Benefit Is A Contingent Liability That The Mead Plan Must Pay On Termination.

(a) Section 4044(d)(1)(A) of ERISA provides that a pension plan like the one here may only distribute "residual" assets to the employer which established the plan "if . . . *all liabilities of the plan to participants and*

their beneficiaries have been satisfied." 29 U.S.C. § 1344 (d)(1)(A).[5]

So far as we, or the parties, have been able to ascertain, neither ERISA, as enacted in 1974, nor its legislative history define or otherwise elaborate on the meaning of § 4044(d)(1)(A)'s phrase "liabilities of the plan." But that language closely parallels § 401(a)(2) of the Internal Revenue Code which, both before ERISA was enacted and presently, provides that a pension plan (or other trust) is a "qualified trust under this section," and is therefore entitled to the special tax treatment afforded such trusts, "(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of *all liabilities with respect to employees and their beneficiaries under the trust* . . . ." for any of the trust's assets to be diverted to any purpose other than the exclusive benefit of employees and their beneficiaries, (emphasis added). Indeed, as amended in 1987, ERISA now equates the "liabilities of the plan" language in § 4044(d)(1)(A) to the parallel language of I.R.C. § 401(a)(2). *See* 29 U.S.C. § 1301(a)(16).

[5] ERISA § 4044(a), 29 U.S.C. § 1344(a), obligates the "plan administrator" on termination to allocate the plan's assets to six categories of benefits set out in priority order.

The statutory materials compel the conclusion, and for that reason this case has proceeded on the assumption, that all of the "liabilities" that § 4044(d)(1)(A) mandates that the plan satisfy on termination must fall within one of § 4044(a)'s six allocation categories.

The liabilities at issue here fall into either category 5 or category 6, but as we have stated, given the plan's full funding, the Court need not decide which one. The relevant portion of § 4044 reads:

> (a) *Order of priority of participants and beneficiaries.* In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:
>
> * * * *
>
> (5) Fifth, to all other nonforfeitable benefits under the plan.
> (6) Sixth, to all other benefits under the plan.

It is a commonplace that in a situation of this kind that it is appropriate to read the more recent statute in conformity with the established meaning of the earlier statute. *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972) (dictum) (citing cases); *United States v. Wells Fargo Bank*, —— U.S. ——, 56 U.S.L.W. 4265, 4266-4267 (March 23, 1988). Petitioner Mead thus agrees that ERISA § 4044(d)(1)(A) ". . . mirrors the [Internal Revenue] Code's pre-ERISA rules . . ." (Pet. Br. p. 15.) But Mead insists that the phrase "liabilities of the plan" extends only to ". . . accrued benefits . . ." and to other benefits that under the express terms of the plan become payable on termination. (Pet. Br. pp. 15-16.) The Internal Revenue Service's well-settled interpretation of I.R.C. § 401(a)(2) shows that Mead is wrong.

The Internal Revenue Service long ago construed the term "liabilities" in the quoted Code provision. *See* Treas. Reg. § 1.401-(2)(b)(2), T.D. 6203, 1956-2 C.B. 219. That regulation provides that the liabilities a qualified trust must satisfy include *both* "fixed" and "contingent" liabilities. To draw the line between these two types of liabilities, the regulation distinguishes between employees who have, and those who have not, ". . . satisfied all the requirements for a monthly pension . . ." such as having completed ". . . the required period of service . . ." *Id.*

As to employees who have satisfied part, rather than all, of the plan requirements, the regulation states, ". . . contingent obligations to such . . . employees have nevertheless arisen *which constitute 'liabilities' within the meaning of that term.*" *Id.* (emphasis added). And the regulation goes on to state the following general rule. "It must be impossible for the employer (or other nonemployees) to recover any amounts other than such amounts as remain in the trust because of 'erroneous

actuarial computations' *after the satisfaction of all fixed and contingent obligations.*" *Id.* (emphasis added.) [6]

A recent revenue ruling reinforces the lesson that a pension plan, upon termination, must treat early retirement benefits whose requirements are satisfied in part as contingent liabilities. In Rev. Rul. 86-48, 1986-1 C.B. 216, the Service ruled that "all liabilities under the plan," as used in IRC § 401(a)(2), includes "contingent" early retirement benefits, like those here. The ruling involved a "spinoff" of pension liabilities and assets from one plan to another. In such a transaction, I.R.C. § 414(l) requires that immediately after the transaction each participant in the plan would ". . . (if the plan then terminated) . . ." receive a benefit equal to or greater than he/she would have received had his/her former plan terminated." To comply with that requirement, of course, one must determine the benefits that must be "satisfied" on termination. The Service ruled as follows:

> A participant's total benefits in the categories under section 4044 include (a) early retirement benefits, retirement-type subsidies and optional forms of benefits described under section 411(d)(6)(B) of the Code that are part of the accrued benefit under section 411(d)(6) . . . *without regard to whether the participant has satisfied all of the conditions for such benefit as of the spinoff. These same benefits also must be taken into account* under section 401(a)(2) and section 1.401-2 *in determining the liabilities that must be satisfied upon plan termination before the employer may recover any plan assets.* [Rev. Rul. 86-48. 1986-1 C.B. 216 (emphasis added).]

Here, five of the respondent employees had satisfied the service requirement of the early retirement benefit but had not yet satisfied the age requirement when the

[6] The section of the Regulation we rely upon first appeared *in haec verba* in 1943. *See* 8 Fed. Reg. 9351-53 (1943) (codified at 26 C.F.R. § 19.165(a)(2)-1(b) (1943)).

plan terminated and the sixth had satisfied a large part but not all of the service requirement (28 years of service out of the required 30) and had not yet reached age 62. That being so, the plan's obligation to the five remained contingent upon their surviving to that age rather than being entirely fixed and to the sixth remained contingent on 2 more years of service. Under the regulation and the cited Code provision, therefore, the obligation to pay the benefit promised is "contingent" and remains a "liability" of the plan.

Having said this much we hasten to add that a plan need not upon termination assume that every contingency, no matter how unlikely, that affects a participant's right to a benefit will occur, nor do we argue that in computing the current value of the benefit the nature of each contingency may not be taken into account. Here, however, the probability is great that respondents will attain the requisite age (indeed, several already have). In addition, both law and practice routinely require actuaries to value plans to provide benefits that are contingent upon survival. *See, e.g.*, I.R.C. §§ 401(11), 417(b)(1) and (2) (requiring certain qualified plans to provide lifetime benefits to participant and spouse which are actuarially equivalent to a single life annuity); Treas. Reg. 1.412(c)(3)-1(f)(2) (1988) (reasonable funding method requires computation of cost of death benefits).

All that being so, we submit that the early retirement benefits here are contingent plan liabilities, and that on termination the plan is obligated to provide an annuity contingent on survival to age 62 (and, where applicable, on completion of service) or pay a lump sum reduced to take the applicable contingency into account. *Cf.* Rev. Rul. 85-6, 1985-1 C.B. 133.

(b) The construction of the phrase "liabilities of the plan" just developed dovetails with the minimum funding obligations ERISA and the Internal Revenue Code

impose upon an employer who maintains a defined benefit pension plan. *See* I.R.C. § 412; 29 U.S.C. §§ 1081-1086.

Broadly stated, those funding standards require a plan to estimate its benefit liabilities and to make certain that amounts contributed by the sponsoring employer are sufficient to amortize those liabilities in such a manner as to enable the plan to pay the promised benefits. I.R.C. § 412(c)(3) requires that costs of providing benefits must be determined on the basis of "reasonable" actuarial assumptions. Treas. Reg. §§ 1.412(c)(3)-1(c) (1988) states that "Under a reasonable funding method, [mandated by I.R.C. § 412(c)(3)] all liabilities of the plan for benefits, whether vested or not, must be taken into account."

Significantly, one of the benefit "liabilities" that "must be taken into account" when funding a plan is a subsidized early retirement benefit such as the one in the Mead Plan. In Rev. Rul. 78-331, 1978-2 C.B. 158, the Internal Revenue Service confronted the question whether under IRC § 412(c)(3) an actuarial assumption that all employees retire at the normal retirement age specified in the plan is "reasonable." The Service answered that question "no" and ruled that ". . . an assumption ignoring the effect of a plan's subsidized early retirement benefit could result in the failure of the plan to satisfy the minimum funding requirements of section 412 of the code." *Id.* More recently, the Service published the Actuarial Guidelines Handbook, as part of the Internal Revenue Service Manual. In that document the Service advised that

> If the plan provides for a subsidized early retirement benefit (a benefit greater than the actuarial equivalent of the normal retirement benefit) be sure to look for an assumed retirement age which is unreasonably high. If there is a history of retirement under the plan, analyze the actual retirement ages elected by the group. However, if the plan has no history, such factors as . . . the level of subsidized early retirement benefits . . . should be considered. [Internal Revenue Service, *Actuarial Guidelines Handbook, Internal Revenue Manual, reprinted in* 1 CCH Pension Plan Guide Par. 3565, Ch. 520 (1986). (Apparently, the Service promulgated the quoted provision of the Manual on December 12, 1984.)]

Severe penalties attach to the failure to comply with the law's minimum funding standards. As enacted, ERISA imposed a 5% initial tax on the amount of any underfunding. P.L. No. 93-406, 88 Stat. 829, 920 (1974) (codified as amended at I.R.C. § 4971(a) (West Supp. 1988) (now 10%). If the deficiency is not cured within the statutory "correction period", a 100% excise tax is imposed. I.R.C. 4971(b).[7]

The foregoing demonstrates that if a plan promises a "subsidized" early retirement benefit, the employer must contribute sufficient funds to the plan each year to assure that those who qualify will receive the benefit. Thus, under the applicable federal law, by the time covered employees complete the required service, an employer whose plan provides for an early retirement benefit must

[7] Law aside, good actuarial practice requires that the cost of early retirement benefits be taken into account in determining cost and benefit recommendations for clients. "The selection of actuarial assumptions is a critical factor in the development of actuarial present values. . . ." American Academy of Actuaries, *Pension Plan Recommendations and Interpretations, reprinted in American Academy of Actuaries, 1988 Yearbook*, p. 373. Among the listed items that the Recommendation advises the actuary to consider are early retirement, voluntary termination, and involuntary termination. *Id.* "The actuary should give careful attention to changes in plan design which may significantly alter the level and trend of expectured future experience. For example, a liberalization of early retirement benefits may make advisable a revision in the retirement assumptions.", and therefore, of the cotnributions the actuary will recommend. *Id.* See also *id.* p. 369.

have contributed an amount which, plus earnings, covers not only the cost of the normal retirement benefit but also the cost of providing at the specified age the "subsidized" portion of the early retirement benefits accrued to the date of termination (so long as those contributions continue to earn interest at the rate assumed by the Plan actuary). *See* Boren *Qualified Deferred Compensation Plans* §§ 8.02 8.04 (1983); *see generally,* McGill, *Fundamentals of Private Pensions* 263 (5th Ed. 1984).

The court below merely required the plan to make payments to the respondent employees out of corpus accumulated by reason of the funding requirements reduced to reflect that the benefit is being accelerated. And given these requirements, we submit that when, on termination, the plan calculated the payments the respondents would receive on the assumption that they would retire at age 65, rather than at age 62, the result was to provide the type of "windfall" at the expense of the covered employees ERISA is designed to prevent. See also *Tilley v. Mead Corporation,* 815 F.2d 989, 992 (4th Cir. 1987) (distinguishing the instant case from one wherein the benefits were unfunded).[8]

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[8] The position we take is consistent with the provisions of the Retirement Equity Act, P.L. No. 397, § 301(a)(2), 98 Stat. 1426, 1451, 98th Cong., 2d Sess. (1984) that amended ERISA's rule prohibiting the reduction of accrued benefits. Under that amendment, if an employee satisfies the requirements for a "retirement-type subsidy" "before or after amendment", the employee must receive the portion of the benefit attributable to the service he/she performed prior to the amendment. I.R.C. § 411(d)(6)(B); 29 U.S.C. § 1054(g)(2)(A).

Congress expected that the same protection would be accorded to "retirement-type subsidies," such as the ERB, on termination. Sen. Rep. No. 575, 98th Cong., 2d Sess. 31 (1984) (plan does not satisfy liabilities on termination unless it has ". . . provided for the payment of contingent liabilities with respect to a participant who, *after the date of the termination* of the plan, meets the requirements for a subsidized benefit.") (emphasis added). The legislative history also makes clear, at a minimum, that no inference may be drawn from the enactment of the provision that the protection the amendment affords participants did not exist under prior law. *Id.* at 28. *Accord,* H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d Sess. 25-26 (1984) (amendment codifies prior law); *Amato v. Western Union Intern., Inc.,* 773 F.2d at 1411.

The arguments in the text are not dependent, however, upon the characterization of the early retirement benefit as "accrued", but on the premise that under pre-ERISA law, and now, the benefit creates a contingent liability that must be satisfied before assets are diverted to the employer.

(c) Examining Mead's interpretation of the plan's obligations on termination in light of the funding standards we have just reviewed demonstrates the extravagance of its claims of doom and gloom if the Company's position is rejected. Treas. Reg. § 1.401-(2)(b) (1988), discussed above, which long antedates ERISA, also states:

> The intent and purpose in Section 401(a)(2) of the phrase 'prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust' is to permit the employer to reserve the right to recover at termination of the trust . . . any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an 'erroneous actuarial computation' is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous acturial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc. and correct procedures relating to the method of funding. [Treas. Reg. § 1.401-2(b)(1) (1956)]

The record contains no evidence that an actuary in fact made an error, and petitioner points to none. Meade asserts, rather, that the relevant provisions of ERISA should be construed both to defeat reasonable benefit ex-

pectations and to distribute the monies contributed to the plan back to the employer all on some theory of a constructive "actuarial error." Only on that reading of the statute, says Mead, will employers adequately fund present plans and, indeed, create such plans in the future. That breathtaking pair of assertions is nothing but hyperbole.

The premise of petitioner's policy argument is that employers create and fund defined benefit plans in order to have the opportunity to recapture assets that have accumulated tax free and that Congress' and the federal courts' insistence that the plans first provide *all* the benefits that employees have earned by performing "credited service" would put an end to the defined benefit plan.[9]

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[9] Petitioner's assertion that the decision below grants credit for service that has not been performed, thus allowing an employee with ten years service to be treated as though he had worked for forty years is patently disengenuous. (*See* Pet. Br., p. 18)

The decision below gave no credit for unearned service and no participant received a pension greater than his actual service entitled him to under the plan's benefit formula. The issue decided was which benefit, early or normal retirement, the participant had earned. *Compare Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 817 F.2d 1528 (11th Cir. 1987), *vacated and reversed on rehearing*, 848 F.2d 1164 (1988) (*en banc*).

Petitioner's arguments that rest on the large amount of money that has been disbursed in termination of "sufficient" plans in recent years is of even less relevance. (*See* Pet. Br. at 25, n.20). There is nothing in the record to show that other plans have terminated without providing subsidized early retirement benefits to participants or even how much, if any, of the amounts recaptured by employers reflected extinction of those subsidies upon termination.

Moreover, at least since 1981, the pension community has been on notice of the Internal Revenue Service's view that to the extent a plan's choice of reduction factors in effect subsidize early retirement benefits, those enriched benefits were accrued and could not be cut back. *See* Rev. Rul. 81-12, 1981-1 C.B. 228, requiring that early retirement reduction factors be stated in the plan. That ruling was later codified by the 1984 amendments to ERISA's Anticutback rule. *See* H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d Sess. 29 (1984).

Employers create defined benefit plans, *inter alia*; because employees demand pension benefits in bargaining; because defined benefit plans improve employee morale by immdiately promising decent pensions to long service, older employees, and by enabling all employees to estimate the amount of the pensions they will receive at retirement, and because defind benefit plans appeal to management itself which often has the longest service. See Driesen, *Reforming The Pension Reform Act*, 3 J. of Pension Planning and Compliance 337, 344-345 (1977). The decision below does nothing to undermine any of those reasons for creating and funding defined benefit plans or for providing early retirement benefits.

This case, moreover, involves a relatively narrow question as to whether the participants should receive a reduced, subsidized early retirement benefit or a reduced normal retirement benefit. It is unlikely in the extreme that the outcome will have the major impact on the pension system Mead hypothesizes.

Putting all the foregoing aside, ERISA's stated policies persuasively suggest that Mead's argument, which requires reading limitations into § 4044(a)(6) of the statute that do not appear on its face, should be rejected. In adopting ERISA, Congress found that ". . . employees and their beneficiaries have been deprived of *anticipated* benefits . . ." and determined to ". . . protect the interests of participants . . . by granting them ready access to the federal courts . . . ERISA, §§ 2(a) & (b), 29 U.S.C. §§ 1001 (a) & (b) (1982) (emphasis added). *Accord, Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ('anticipated pension benefits"). ERISA was also adopted in part because pensions ". . . substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment . . ." and reform was ". . . desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States . . ." ERISA, § 2(a), 29 U.S.C. § 1001 (a) (1982). Pension contributions are specially deduc-

tible from the employer's income tax when paid, not when benefits are paid or accrued, and the trust is tax exempt precisely to ". . . insure the integrity of the employees' plan . . ." *See Don E. Williams v. Commissioner*, 429 U.S. 569, 579 (1977).

Narrowly reading the statutory provisions protecting employee rights in order to increase the tax sheltered assets an employer may recapture when the employer unilaterally terminates a plan, mocks the statute's objectives.[10]

II. The Pension Protection Act Of 1987 Demonstrates That PBGC And Petitioner's Argument That Early Retirement Subsidies Are Not Plan Liabilities Is Erroneous.

Petitioner's and the Pension Benefit Guaranty Corporation's contention that only "accrued" benefits may be allocated to Category 6 of § 4044(a) cannot survive the amendments Congress made to § 4041(b)(1)(D) in the Pension Protection Act passed in 1987.[11] In that statute, Congress provided that, to recapture plan assets, an em-

[10] Assets remain upon termination for a variety of reasons. Actuaries typically assume conservatively low rates of return on investments. On termination, however, plans may use investment assumptions, which are based on current market rates, to value benefits. Rev. Rul. 83-52, 183-1 C.B. 87. These rates have generally been higher than the typical actuary's conservative assumptions, thus decreasing the payout to employees, and increasing residual assets. Plans often fund on the assumption that employee compensation will rise over the years because of inflation. When the plan terminates, the employee has not yet begun earning his/her final salary; the compensation base for calculating benefits is often thus lower than that assumed in funding the plan. In addition, of course, investment, mortality, employee turnover and other actuorial assumptions may turn out to be more favorable than anticipated. The investment returns in recent years, for example, have far exceeded many actuaries' assumptions as security prices and interest rates have risen.

[11] Pension Protection Act, §§ 9312(b)(4) & 9313(a)(1), P.L. 100-203, 101 Stat. 1330 (1987), *amending* 29 U.S.C. §§ 1301(a)(16), 1341(b)(1)(D).

ployer must terminate a defined benefit plan through a "standard termination." In such a termination the employer is entitled to a recapture only if, ". . . the plan is sufficient for benefit liabilities (determined as of the date of termination)." 29 U.S.C. § 1341(b)(1)(D) The Conference Report explaining the statutory language states that "benefit liabilities" include

> . . . all benefits that have been promised under the plan up to the date of plan termination, and consists of *all fixed and contingent liabilities* to plan participants and beneficiaries, including liability for benefits in effect on the date of termination that are not protected under section 411(d)(6) of the Code or Section 204(g) of ERISA. [H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 879, 884 (1987) (Emphasis added.)

The italicized language parallels precisely the language in Treas. Reg. § 1.401-2(b)(2) which we discussed *supra*, pp. 6-7.

PBGC's theory that § 4044(a)(6) covers only accrued benefits thus leads to the following absurdity: under § 4044(a)(6) an employer need *not* allocate assets to benefits that under § 4041(b)(1)(D) Congress has decreed *must* be provided if the plan is to terminate. That anomaly is entirely of PBGC's own making and is not required by § 4044(a)(6)'s language or ERISA's legislative history. Certainly, then, the better course is to reject PBGC's position as unsound and to read ERISA in a manner that harmonizes all its parts.[12]

[12] PBGC's position is entitled to little weight for reasons aside from its lack of merit. Prior to recent amendments to Title VI of ERISA, once satisfied that a plan had sufficient assets to allocate to benefits in categories 1-4 (the guaranteed benefits), PBGC left the allocation of assets to benefits in categories 5 and 6 (the ones at issue here), to the plan administrator. See 29 C.F.R. § 2617.12(c) (1987). Of course, if a plan had insufficient assets to pay guaranteed benefits, none were allocated to the lower benefit categories. In either event, therefore, PBGC had no day-to-day rsponsibility

CONCLUSION

For the reasons set out above, the decision below should be affirmed.

Respectfully submitted,

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to consider what benefits are in categories 5 and 6. Under the statute as amended, PBGC's role in the allocation of assets to non-guaranteed benefits is further diminished. See Amendment of PBGC Rules on Notice of Intent To Terminate, etc., 52 Fed. Reg. 33,318, 33-319 (1987) (to be codified at 29 C.F.R. Parts 2616 and 2617) (Proposed Sept. 2, 1987); Rose and Rosenzweig, *Single-Employer Pension Plan Amendments Act of 1986*, Pension Briefings No. 86-7 at p. 6 (July, 1988). *Compare* Notice of Intent To Terminate, 29 C.F.R. Parts 2616, 2617 (1987) *with* 52 Fed. Reg. 33,318, *et seq., supra.* See also *Amato v. Western Union International, Inc.*, 773 F.2d at 1415.

Furthermore, in a Brief for the United States as *Amicus Curiae* filed in *Amato, supra*, at 7, 8, the Internal Revenue Service took the position that subsidized, early retirement benefits were accrued benefits under the pre-REA cutback rule, the opposite of PBGC's position here. Since the definition of "accrued benefit" is the same in the Internal Revenue Code as in Title IV of ERISA, PBGC's restriction of its position to an interpretation of that title, PBGC Br., p. 6, n.3, is a confession that PBGC disagrees with "the United States". *Compare* § 3(23) with I.R.C. § 411(a)(7). *See also Amato*, 773 F.2d at 1412. In these curious circumstances, the deference usually accorded to an administrative agency should be withheld.